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No. ———

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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DEWEY T. NABORS, JR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in ruling that evidence of Petitioner's pre-arrest silence was properly admitted to prove guilt as part of the government's case-in-chief, even though Petitioner had announced his intention not to testify in his own behalf (and in fact never testified), and despite Petitioner's contemporaneous objection that introduction of such evidence violated the self-incrimination and due process clauses of the Fifth Amendment to the United States Constitution, U.S. Const. amend. V?

2. Whether the Court of Appeals erred in ruling that evidence of Petitioner's alleged prior similar activities was admissible to prove intent, even though Petitioner never took the stand to testify in his own behalf or otherwise affirmatively placed the question of his criminal intent in issue?

3. Whether the Court of Appeals erred in ruling that the government was not required, in response to Petitioner's motion under 18 U.S.C. § 3504 (1976), to affirm or deny the use of illegal electronic surveillance in its investigations leading to the prosecution of this case?

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UNITED STATES OF AMERICA,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

Petitioner, Dewey T. Nabors, Jr., hereby makes application to this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming Petitioner's conviction before the United States District Court for the Middle District of Georgia on charges alleging conspiracy and substantive violations of the Controlled Substances Act, 21 U.S.C. §§ 841, 846 (1976), and the Controlled Substances Import and Export Act, 21 U.S.C. §§ 952, 960, 963 (1976).

## OPINIONS BELOW

The decision of the Court of Appeals is reported at 707 F.2d 1294 (11th Cir. 1983) and appears at pages A1-16 of the Appendix. The order of the Court of Appeals, denying Petitioner's request for reconsideration and suggestion for rehearing *en banc*, is unpublished and appears at page A17 of the Appendix.

The transcript of Petitioner's jury trial before the United States District Court for the Middle District of Georgia is unpublished. Excerpts from the trial transcript which Petitioner believes to be material to this Court's consideration of the questions presented, appear at pages A43-49 of the Appendix.

## JURISDICTIONAL GROUNDS IN THIS COURT

The decision of the Court of Appeals was entered June 23, 1983. On July 13, 1983, Petitioner timely filed a request for reconsideration and suggestion for rehearing *en banc*. Petitioner's request was denied by order of the Court of Appeals, entered August 15, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

18 U.S.C. § 3481 (1976):

> In trial of all persons charged with the commission of offenses against the United States and at all proceedings in courts marshall and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

18 U.S.C. § 3504 (1976):

> (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—
>
> > (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;
> >
> > . . .
>
> (b) As used in this section "unlawful act" means any act [sic] the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

Fed. R. Evid. 404(b):

> (b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

## STATEMENT OF THE CASE

Petitioner's conviction in this case was secured through a combination of trial tactics and court rulings which clearly violated his federal statutory and constitutional rights. While only a full briefing and plenary consideraton of the case can reveal completely the degree to which Petitioner's fundamental rights have been abridged, an outline of the proceedings and decisions below should give the Court some idea of the unfair treatment to which Petitioner has been subjected.

On December 3, 1981, an indictment was returned to the United States District Court for the Middle District of Georgia charging Petitioner, in six counts, with conspiring to import marijuana and methaqualone (Count I), conspiring to possess marijuana and methaqualone with intent to distribute (Count II), importing marijuana and methaqualone (Counts III and IV) and possession of marijuana and methaqualone (Counts V and VI) in violation of the Controlled Substances Act, 21 U.S.C. §§ 841, 846 (1976), and the Controlled Substances Import and Export Act, 21 U.S.C. §§ 952, 960, 963 (1976) (A50-52). On February 17, 1982, Petitioner entered a plea of not guilty as to all charges alleged in the indictment.

Prior to trial, Petitioner moved, pursuant to 18 U.S.C. § 3504 (1976), to require the government to affirm or deny the use of illegal electronic surveillance in its investigations leading to the prosecution of this case (A34-36). In support of his motion, Petitioner submitted two affidavits. The first affidavit, by Petitioner's counsel, stated that an analysis of government documents and other public records revealed that during the period relevant to this case,[1] the National Security Agency systematically conducted covert electronic surveillance of virtually all international telephone calls originating or terminating in the United States and that information obtained from these monitoring activities had been disseminated to law enforcement agencies (A37-40). The second affidavit, by Petitioner, stated that he had been a party to a number of international telephone calls relating to the subject matter of the indictment and that, based upon the National Security Agency's pervasive surveillance activities, Petitioner believed that some or all

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[1] Although the indictment in this case alleged the existence of a conspiracy during the period January 1, 1980 through April 13, 1980, at trial the government was permitted to introduce evidence that, four years earlier, Petitioner and the government's principal witness allegedly engaged in similar drug trafficking activities.

of his international telephone calls had been intercepted by agencies of the United States government (A41-42). Despite Petitioner's affirmative assertion of illegal surveillance, and in apparent disregard of the factual basis offered in support of his claim, the district court denied Petitioner's motion on the grounds that his assertion of unlawful surveillance was insufficient to constitute a "claim" within the meaning of 18 U.S.C. § 3504 (1976) (A20-33).[2]

At trial, Petitioner declined to testify and produced no witnesses, limiting his evidence to the introduction of three documentary exhibits intended to impeach two of the government's witnesses. In short, Petitioner elected to exercise his Fifth Amendment right to remain silent and put the government to the test of fully proving its case against him. In an apparent recognition of the weakness of its direct evidence of Petitioner's guilt, however, the government chose to meet its burden by commenting on Petitioner's exercise of his privilege against self-incrimination and by introducing evidence of alleged "prior similar activities," the probative value of which was substantially outweighed by its prejudicial effect.

The government's case consisted largely of the testimony of Michael Warner, an alleged "accomplice" and

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[2] The district court also found Petitioner's motion to be untimely. Although the Court of Appeals never reached this issue, it should be noted that Petitioner's motion was filed nearly two weeks before the scheduled trial date. Moreover, any delay in the trial of the case as a result of granting Petitioner's motion could have been avoided by proceeding to trial, yet still requiring the government to search its files for evidence of illegal surveillance. If such evidence was discovered, it could have been addressed after trial, as defense counsel suggested (A33). *See United States v. Buck*, 548 F.2d 871, 874 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977) (approving a similar procedure). In any event, the district court's conclusion with respect to the timeliness of Petitioner's motion was premised on the assumption that motions under 18 U.S.C. § 3504 (1976) must be filed prior to trial. A plain reading of the statute, however, suggests that such an assumption is erroneous, especially in light of the fact that *any* witness may make a claim of illegal surveillance under section 3504.

"co-conspirator" of Petitioner in the offenses charged in the indictment. Warner, a twice-convicted felon and admitted perjurer, testified that he had been hired by Petitioner to fly to Colombia, pick up certain quantities of marijuana and methaqualone, and bring them back to Georgia. Warner further testified that on the morning of April 12, 1980, he departed for Colombia in a single-engine Cessna aircraft leased by Petitioner and arrived shortly after 6:00 p.m. that same day. After loading the plane with alleged controlled substances, Warner began his return flight to the United States. When Warner arrived at his intended landing site, however, it was obscured by fog. Following a search for alternative landing sites, Warner located a "crop dusting strip" in Dooly County, Georgia, near the town of Unadilla. After landing the plane, Warner immediately set it on fire, inadvertently causing local law enforcement officers to arrive at the scene. The officers salvaged some of the plane's contents, which they suspected to be marijuana and methaqualone.[3] Warner was arrested shortly thereafter and later convicted in state court on drug charges.[4]

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[3] More than four months after the return of the indictment in this case, and two months after Petitioner had requested an opportunity to examine and test the materials seized from the aircraft, the alleged contraband was destroyed by the government. Nevertheless, the district court, over Petitioner's objections, allowed the government to introduce testimony concerning its testing and identification of the seized materials. Although not an issue discussed in detail in this petition, Petitioner maintains that the government's destruction of this critical evidence was in negligent disregard of its duty to preserve material evidence and that testimony concerning its testing and identification of the alleged contraband should have been excluded. *See United States v. Bryant*, 439 F.2d 642, 651 (D.C. Cir.), *on remand*, 331 F.Supp. 927, *aff'd*, 448 F.2d 1182 (D.C. Cir. 1971).

[4] Following Warner's sentencing by the Dooly County Superior Court to imprisonment for a term of twenty-two years and his subsequent agreement with law enforcement authorities to provide testimony against Petitioner, a motion was filed on Warner's behalf to reduce his prison sentence. That motion, although pending

In addition to Warner's direct testimony concerning Petitioner's involvement in the drug trafficking activities forming the basis of the indictment, the government was allowed to introduce, over objection and as part of its case-in-chief, testimony by Warner that he and Petitioner had engaged in similar drug smuggling operations four years earlier. Although the district court acknowledged that evidence of prior acts is ordinarily not admissible against a criminal defendant, it allowed this testimony under the "intent" exception to Rule 404(b) of the Federal Rules of Evidence (A43-46). In this respect, it is important to note that the district court ruled on the admissibility of "prior acts" evidence before the government had introduced any evidence in its direct case and without knowing the nature of Petitioner's defense. Moreover, this clearly prejudicial evidence was admitted to prove intent, even though Petitioner never took the stand to testify in his own behalf or otherwise affirmatively placed the question of his criminal intent in issue.

Warner was the only witness who gave direct testimony concerning Petitioner's involvement in the drug trafficking activities charged in the indictment. Virtually all of the government's other evidence was intended to corroborate some circumstantial aspect of Warner's testimony or to connect Petitioner with the aircraft allegedly involved in the incidents resulting in the charges in this case. The only exception was evidence concerning Petitioner's pre-arrest silence. In this regard, the district court permitted the government to introduce, as part of its case-in-chief, evidence that Petitioner had remained silent in response to an insurance company's demand that he provide a statement under oath as to his involvement in the use and loss of the aircraft which the government contended had been utilized by Warner to transport the controlled substances referred to in the indictment. Evi-

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for nearly one and one-half years without opposition from the State, had not been ruled upon prior to Warner's testimony at Petitioner's trial.

dence of Petitioner's silence was admitted despite the fact that Petitioner had announced his intention not to take the stand in his own behalf (and in fact never testified), and over Petitioner's timely objection that the introduction of such evidence violated his rights under the due process and self-incrimination clauses of the Fifth Amendment to the United States Constitution (A47-49).

On June 9, 1982, Petitioner was found guilty by jury verdict on all counts of the indictment. On June 28, 1982, the district court sentenced Petitioner to a total of fifteen years imprisonment, followed by a five year special parole term.[5] On that same day, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit (A19).

On appeal, Petitioner challenged a number of the district court's rulings, including its decisions: (1) allowing evidence, as part of the government's case-in-chief, of Petitioner's pre-arrest silence; (2) admitting evidence of alleged prior similar activities on the issue of Petitioner's criminal intent; and (3) denying Petitioner's motion, under 18 U.S.C. § 3504 (1976), to require the government to affirm or deny the use of illegal electronic surveillance.

On June 23, 1983, the Court of Appeals affirmed the judgment of the district court in all respects. As to the admissibility of Petitioner's pre-arrest silence, the court acknowledged that the issue presented a difficult question of constitutional law and that the only case allowing prosecutorial comment on a defendant's pre-arrest silence as part of the government's direct case, *United States v. Robinson*, 523 F. Supp. 1006 (E.D.N.Y. 1981), *aff'd*, 687 F.2d 427 (2d Cir. 1982), was readily distinguishable.

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[5] The formal sentence was five years on Count I; five years on Count II, consecutive to Count I; and five years followed by a special parole term of five years on each of Counts III-VI, the sentences on Counts III-VI being concurrent with each other, but consecutive to the sentence imposed with respect to Count II.

Nevertheless, the Court of Appeals held that evidence of Petitioner's pre-arrest silence was properly admitted to prove guilt as part of the government's case-in-chief (A9-12).[6]

The Court of Appeals also upheld the admission of "prior acts" evidence under the "intent" exception to Fed. R. Evid. 404(b), concluding (1) that Petitioner had somehow placed his intent in issue through cross-examination of government witnesses designed to negate evidence of Petitioner's participation in the conspiracy charged, and (2) that, in any event, under *United States v. Roberts*, 619 F.2d 379 (5th Cir. 1980), evidence regarding prior acts is automatically admissible in every conspiracy case, "unless the defendant has affirmatively removed the issue of intent" (A13).

Finally, the Court of Appeals affirmed the district court's denial of Petitioner's motion to require the government to affirm or deny the use of illegal electronic surveillance under 18 U.S.C. § 3504 (1976), on the grounds that Petitioner's assertion of illegal surveillance was insufficient to constitute a "claim" within the meaning of section 3504, because it did not contain a "positive statement that unlawful surveillance did in fact take

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[6] The Court of Appeals based its holding on four grounds. First, the court concluded that since the prosecution could have introduced statements made by Petitioner in response to the insurance company's demand, and since Petitioner had not asserted his privilege against self-incrimination at the time of his initial silence, the prosecution should have been able to use Petitioner's silence against him. Second, the Court of Appeals viewed Petitioner's failure to respond to the insurance company's demand as more nearly action than silence. Third, as the result of an apparent failure to balance the government's need for the evidence against the Petitioner's privilege against self-incrimination, the court found that Petitioner had offered no persuasive justification for reversing the district court on this point. Finally, relying largely on other improperly admitted evidence concerning Petitioner's alleged prior similar activities, the court held that even if the government's use of Petitioner's pre-arrest silence was error, it was harmless error (A9-12).

place," or demonstrate a causal link between such surveillance and his prosecution (A15-16).

On July 13, 1983, Petitioner filed a request for reconsideration and suggestion for rehearing *en banc*. Petitioner's request was denied by order of the Court of Appeals, entered August 15, 1983 (A17-18). Petitioner now seeks a writ of certiorari for review of the decision below.

## REASONS FOR GRANTING THE WRIT

### A. The Admissibility of Evidence of Petitioner's Pre-Arrest Silence To Prove Guilt, as Part of the Government's Case-in-Chief in a Trial in Which Petitioner Did Not Testify, Presents an Important Question of Constitutional Law Which Has Not Been, But Should Be, Settled By the Supreme Court.

As previously noted, the district court permitted the government to introduce, as part of its case-in-chief, evidence that Petitioner had remained silent in response to an insurance company's demand for a statement under oath as to his involvement in the use and loss of an aircraft which the prosecution contended was involved in the incidents resulting in the charges in this case. Evidence of Petitioner's silence was admitted despite the fact that Petitioner had announced his intention not to take the stand in his own behalf (and in fact never testified), and over Petitioner's timely objection that the introduction of such evidence violated his rights under the due process and self-incrimination clauses of the Fifth Amendment.[7]

On appeal, the Eleventh Circuit Court of Appeals upheld the trial court's ruling. In reaching this result,

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[7] The Fifth Amendment, U.S. Const. amend. V, provides in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

however, the court explicitly recognized that the issue whether evidence of Petitioner's pre-arrest silence should have been admitted at trial presented a difficult question of constitutional law (A7). In this respect, the court correctly noted that the leading Supreme Court decisions on the prosecution's use of a defendant's silence are not directly on point. For example, in *Doyle v. Ohio*, 426 U.S. 610 (1976), this Court held that the government cannot, consistent with due process, comment at trial upon a defendant's pre-trial silence after receiving *Miranda* warnings, even for impeachment purposes. *See also United States v. Hale*, 422 U.S. 171 (1975) (reaching same result based on the Supreme Court's supervisory powers over lower federal courts). In *Jenkins v. Anderson*, 447 U.S. 231 (1980), however, this Court held that evidence of a defendant's silence prior to his arrest is admissible to *impeach* the defendant's testimony at trial.

The circumstances surrounding the introduction of evidence of Petitioner's silence in this case differ in a critical respect from the circumstances involved in *Jenkins* and other cases concerning the use of a defendant's pre-arrest silence. In this case the government introduced evidence of Petitioner's silence in its direct case in a trial in which the Petitioner did *not* testify. As such, the question presented below was whether and to what extent pre-arrest silence is protected by the Fifth Amendment in a case where the defendant chooses not to testify. This is an issue which has not been, but should now be, settled by the Supreme Court.

In *Jenkins*, this Court specifically reserved decision on this precise issue, stating:

> In this case, the petitioner remained silent before arrest, but chose to testify at his trial. Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment. We simply do not reach that

> issue because the rule of *Raffel* clearly permits impeachment even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silent.[8]

447 U.S. at 236 n.2. The concurring and dissenting opinions in *Jenkins*, however, did address the issue—reaching contrary conclusions. In his concurring opinion in *Jenkins*, Justice Stevens, joined by Justice Stewart, suggested that an individual's right not to incriminate himself exists only when he is under "official compulsion" to speak and he has affirmatively asserted his constitutional right to remain silent. *Id.* at 243-44. Under this approach, the prosecution could raise prior silence even if the defendant chose not to testify in his own behalf, as long as the evidence was relevant and the defendant's pre-arrest silence was not in response to an official governmental inquiry.[9] *Id.* at 244 n.7.

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[8] In *Raffel v. United States*, 271 U.S. 494 (1926), the defendant was indicted and twice tried for conspiracy to violate the National Prohibition Act. At his first trial, the defendant declined to take the witness stand to challenge inculpatory statements by a government witness. Following a mistrial, the defendant was tried again and this time elected to testify in his own behalf to deny the testimony of the same government witness. During cross-examination, the prosecutor commented upon the defendant's silence at his earlier trial, inferring that his present testimony was a recent fabrication. *Id.* at 495. This Court held that prosecutorial comment on the defendant's prior, constitutionally protected silence did not violate his Fifth Amendment privilege against self-incrimination, reasoning that "[t]he immunity from giving testimony is one which the defendant may waive by offering himself as a witness." *Id.* at 496-97. In *Jenkins* this Court applied the rationale in *Raffel* to hold that a defendant's exercise of his Fifth Amendment right to remain silent is not impermissibly burdened by the use of his pre-arrest silence for impeachment purposes. 447 U.S. at 235.

[9] Only one lower federal court has adopted the approach suggested by Justice Stevens. In *United States v. Robinson*, 523 F.Supp. 1006 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir. 1982), the court held that the prosecution did not infringe the defendant's

In contrast, Justice Marshall, in his dissenting opinion, which was joined by Justice Brennan, found Justice Stevens' view of the Fifth Amendment "incomprehensible":

> Apparently, under [Justice Stevens'] view, a person's right not to incriminate himself exists only if the government has already attempted to compel him to do so. (Citations omitted). If no officials have tried to get the person to speak, he evidently has a duty to incriminate himself, because the reporting of crime is a civic duty and the Fifth Amendment is not applicable since the decision to speak or remain silent is, at that time, "voluntary." (Citations omitted).
>
> But the prohibition against compelled self-incrimination is another way of expressing the right not to incriminate oneself. (Citations omitted). After all, the only means of compelling a person to incriminate himself is to penalize him if he does not. . . . [T]he Constitution . . . prohibits the government from burdening the right not to incriminate oneself by penalizing silence. In the present case the violation of the Fifth Amendment occurred not when the defendant remained silent, but when that silence was later used against him at his criminal trial.

*Id.* at 250 n.4. In addition, Justice Marshall was of the opinion that pre-arrest silence is so ambiguous and lacking in probative value that its use at trial, even for

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Fifth Amendment privilege by raising, in its case-in-chief, the defendant's silence in the face of an implicit accusation by a cashier that he had handed her counterfeit money. As the Court of Appeals below recognized, however, the circumstances involved in *Robinson* are readily distinguishable from those in the present case. *Robinson* involved silence combined with action. When the cashier handed the tendered bills back to the defendant and asked for "real money," the defendant without saying anything, handed the cashier genuine money. Moreover, *Robinson* differs from the case at bar in that here Petitioner's silence occurred independent of the commission of the alleged crime.

impeachment purposes, is fundamentally unfair and deprives the accused of due process of law. *Id.* at 246-49.

This Court's specific reservation of decision on the question whether, and under what circumstances, pre-arrest silence may be protected by the Fifth Amendment where the defendant does not testify at trial, coupled with conflicting pronouncements by the individual Justices, has left this important issue unsettled and in need of clarification. Under these circumstances, it is not surprising that in addressing this issue lower federal courts have reached conflicting conclusions. For example, the decision of the Court of Appeals in the present case apears to be in direct conflict with the Third Circuit's opinion in *United States v. Sprengel*, 103 F.2d 876 (3d Cir. 1939). In that case a postal inspector mailed questionnaires to several individuals who were ultimately prosecuted for participating in a mail fraud conspiracy. At trial, the inspector was allowed to testify that the defendants had failed to respond to the questionnaires. The Third Circuit held that the admission of this testimony "constituted prejudicial error," stating:

> The law is well settled that a defendant cannot be compelled to testify against himself and that a prosecuting attorney may not comment upon his failure to so testify. The question presented by this aspect of the case at bar is closely analogous. The appellants were not compelled by law to respond to the questionnaires of the Post Office Department and the fact that they did not do so does not present evidence that they acted in bad faith or were not acting in good faith. *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746; *McKnight v. United States*, 6 Cir., 115 F. 972.

*Id.* at 883. Similarly, in *United States v. Caro*, 637 F.2d 869 (2d Cir. 1981), a case decided after *Jenkins*, the Second Circuit expressed doubts as to the constitutionality of the use of pre-arrest silence by the government for purposes other than impeachment:

> Whatever the future impact of *Jenkins* may be, we have found no decision permitting the use of silence, even the silence of a suspect who has been given no *Miranda* warnings and is entitled to none, as part of the Government's direct case. . . . [W]e are not confident that *Jenkins* permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case in chief. We will thus assume, without deciding, that even if we were to hold that [the defendant] was not in custody [at the time of the silence], this would not necessarily carry the day for the prosecution in light of the fact that all of the cases permitting proof of silence, including *Jenkins*, have involved impeachment or rebuttal of the defendant's testimony.

*Id.* at 876; *see also United States v. Lewis*, 651 F.2d 1163 (6th Cir. 1981) (quoting the above language from *Caro* with approval, and excluding evidence of pre-arrest silence on due process grounds since the defendant had been given *Miranda* warnings). *But see United States v. Robinson*, 523 F.Supp. 1006 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir. 1982) (permitting evidence of pre-arrest silence even though defendant did not testify).

In the instant case, Petitioner has consistently maintained that his decision to remain silent, commencing with his refusal to respond to the insurance company's demand for a statement under oath,[10] and continuing

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[10] The insurance company's demand sought information relating directly to the incidents which eventually resulted in the indictment in this case. Petitioner could reasonably have supposed that any information provided to the insurance company would eventually have been made available to law enforcement authorities, thereby significantly enhancing the likelihood of criminal prosecution. Moreover, Petitioner could reasonably have assumed that the demand was made in anticipation of civil litigation. *See Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (holding Fifth Amendment privilege is available in civil cases). Under these circumstances, it can scarcely be denied that the insurance company's demand posed a "real and

through trial with his decision not to testify, was an invocation of his right to remain silent protected by the Fifth Amendment.[11] U.S. Const. amend. V; *see also* 18 U.S.C. § 3481 (1976). Petitioner asserted his privilege against self-incrimination at the earliest available opportunity by objecting to the admission of evidence of his pre-arrest silence, and announcing his intention not to take the stand, prior to the government's presentation of its direct case.[12] Nevertheless, the district court permitted the government to introduce evidence of Petitioner's silence to prove guilt as part of the government's

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appreciable" and not merely "imaginary and unsubstantial" hazard of self-incrimination. *See Marchetti v. United States*, 390 U.S. 39 (1968); *Rogers v. United States*, 340 U.S. 367 (1951).

[11] The Court of Appeals' attempt to characterize Petitioner's silence as "action" is unsupported in fact or law. Petitioner's failure to respond to the insurance company's demand to file a claim for insurance proceeds cannot be distinguished on any principled basis from a defendant's failure to file informational tax returns. *See, e.g., Grosso v. United States*, 390 U.S. 62 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968). In either case, it reasonably can be supposed that the information requested may eventually be used in civil or criminal litigation. As such, the demand for such information is "not significantly different from a demand that [the defendant] provide oral testimony." *Marchetti v. United States*, 390 U.S. at 57.

[12] In this respect, the Court of Appeals' finding that Petitioner "never asserted the privilege" was clearly erroneous. Relying on an apparent misreading of *Roberts v. United States*, 445 U.S. 552 (1980), the Court of Appeals concluded that since Petitioner had not claimed the privilege at the time of his pre-arrest silence, he could not claim it at trial (A9-10). What is required by *Roberts*, however, is not that the privilege be claimed at the time of the defendant's silence, but rather that it be invoked "in a timely fashion" before the "tribunal which must pass upon it." 445 U.S. at 559, 560. In this case, Petitioner clearly satisfied this requirement by asserting his privilege against self-incrimination before the trial court prior to the government's presentation of its evidence of Petitioner's pre-arrest silence.

case-in-chief, in clear violation of his Fifth Amendment rights.[13]

In allowing the introduction of evidence of Petitioner's pre-arrest silence, the lower court failed to balance the government's need for such evidence against Petitioner's constitutionally protected right against self-incrimination. As this Court stated in *Jenkins*:

> In determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice. (Citations omitted). Attempted impeachment on cross-examination of a defendant, the practice at issue here, may enhance the reliability of the criminal process. Use of such impeachment on cross-examination allows prosecutors to test the credibility of witnesses by asking them to explain prior inconsistent statements and acts. A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once a defendant decides to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." (Citations omitted).

447 U.S. at 238.[14] Unlike the defendant in *Jenkins*, in this case Petitioner did not take the witness stand to

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[13] That Petitioner's silence was in response to an inquiry by a private party is not controlling inasmuch as the violation of Petitioner's Fifth Amendment rights occurred not when he remained silent, but when his silence was later used against him *by the government* as part of its direct case. *See Jenkins v. Anderson*, 447 U.S. at 250 n.4 (Marshall, J. dissenting). Prosecutorial comment upon a non-testifying defendant's pre-arrest failure to come forward with information pertaining to the charges against him is just the type of retributive sanction the Fifth Amendment was designed to prohibit.

[14] The circumstances in *Jenkins* were similar to those in *Harris v. New York*, 401 U.S. 222 (1971). In that case, the Court held

testify in his own behalf and evidence of his prior silence was not necessary for impeachment purposes. Hence, the considerations justifying the admission of pre-arrest silence in *Jenkins*—the prevention of perjury and the enhancement of the truth-finding function of the court—were not applicable here. It is respectfully submitted that, in the absence of similar considerations, the admission of evidence of Petitioner's pre-arrest silence in the instant case impermissibly burdened the exercise of his constitutional privilege against self-incrimination and that, upon full briefing and plenary consideration, this Court is likely to so find.

**B. The Court of Appeals' Ruling with Respect to the Admissibility of Evidence of Petitioner's Alleged Prior Similar Activities Is in Conflict With the Decisions of Other Federal Courts of Appeals and Presents Important Questions of Constitutional Law.**

As part of the government's case-in-chief, it introduced evidence by its principal witness that, four years earlier, he and Petitioner had engaged in activities similar in nature to the criminal acts charged in the present case. Over Petitioner's objection, the district court admitted this testimony under the "intent" exception to Fed. R. Evid. 404(b). The Court of Appeals affirmed, concluding

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that a statement taken in violation of the defendant's *Miranda* rights could be used to impeach his testimony at trial, where the statement partially contradicted the defendant's direct tesimony. *Id.* at 225-26; *see also Fletcher v. Weir*, 102 S.Ct. 1309 (1982); *Anderson v. Charles*, 447 U.S. 404 (1980). This Court's decision in *Jenkins* effectively extended the rule in *Harris* by holding that a prosecutor may properly impeach a defendant's testimony by reference to any prior inconsistency, regardless of whether the prior inconsistency is a contradictory statement or an inexplicable silence. The reasoning employed in extending *Harris* to the facts in *Jenkins*, however, is not applicable to the present case. Petitioner did not testify at trial and evidence of his pre-arrest silence was not needed to impeach his testimony. In short, there was no inconsistency to be resolved and no basis to "conjure up the specter of perjury." 447 U.S. at 253 (Marshall, J. dissenting).

(1) that Petitioner had somehow placed his criminal intent in issue through cross-examination intended to challenge the government's evidence of his participation in the conspiracy charged, and (2) that, in any event, under *United States v. Roberts*, 619 F.2d 379, evidence regarding prior acts is automatically admissible in every conspiracy case, "unless the defendant has affirmatively removed the issue of intent" (A13).

Although evidence of an accused's prior acts may be admissible to prove, *inter alia*, intent, before such evidence may be admitted the district court must first determine that it is relevant to *an issue in the case* (other than the defendant's character) *and* that its probative value is not substantially outweighed by its prejudicial effect. *See United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979). In the instant case, the district court clearly erred in admitting evidence of Petitioner's alleged prior similar activities, since neither of the prerequisites for admitting such evidence was present.

In the first place, although intent was a formal issue in the case, in the sense that it was an element of the conspiracy counts charged, it was not an issue which was contested so as to justify admitting prejudicial prior acts evidence. Petitioner never "sharpened" the issue of intent by asserting that the crimes charged were done innocently or by accident or mistake.[15] Rather, he simply contended that he had not participated in the offenses alleged in the indictment.

[15] Notwithstanding the Court of Appeals' suggestion to the contrary, Petitioner's cross-examination of government witnesses was not intended to, nor did it, put Petitioner's intent in issue. Rather, it was intended to challenge the government's evidence that Petitioner had *participated* in the alleged conspiracy. As the Court of Appeals itself noted, Petitioner "hoped the jury might conclude he had nothing to do with the illegal drug smuggling operation," not that he had participated in that operation with an innocent intent. *See United States v. Powell*, 587 F.2d 443, 448 (9th Cir. 1978) (holding that a denial of participation in acts constituting the crime charged does not raise the issue of intent).

Second, as the trial record shows, in admitting evidence of Petitioner's alleged prior acts, the district court failed to balance the prejudice to Petitioner against the government's need for such evidence. In fact, the district court ruled on the admissibility of "prior acts" evidence before the government had presented any part of its direct evidence and without knowing the nature of Petitioner's defense. As such, the district court simply lacked the information necessary to determine the government's need for such evidence. Had the court engaged in the requisite balancing, it is clear that, under the facts of this case, evidence of Petitioner's alleged prior activities would have been excluded.[16]

Rather than first determining whether the issue of intent was genuinely contested and then balancing the government's need for prior acts evidence against its clearly prejudicial effect, the district court based its ruling on a mechanical application of the Fifth Circuit's decision in *United States v. Roberts*, 619 F.2d 379. Under the theory announced in *Roberts* and adopted by the lower courts in this case, a defendant's mere plea of not guilty is deemed to place the question of criminal intent at issue in *every* conspiracy case. Evidence of prior similar acts is then automatically admissible, unless the defendant affirmatively removes the issue of intent by stipulating that if his participation in the acts evidencing the conspiracy is established, then intent may be assumed. As demonstrated below, this rule is not only in direct conflict with the de-

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[16] This was not a case in which the government was handicapped by a lack of direct evidence of intent. Michael Warner testified at length as to Petitioner's alleged involvement in the drug smuggling activities charged in the indictment. If the jury believed Warner's testimony as to Petitioner's participation in the criminal acts charged, they could have inferred that Petitioner had engaged in those activities with the requisite criminal intent. Hence, Warner's further testimony concerning Petitioner's alleged prior drug trafficking activities added little, if anything, to a revelation of Petitioner's state of mind with respect to the offenses charged.

cisional authority in at least three other Circuits,[17] but impermissibly burdens an accused's exercise of his Fifth and Sixth Amendment rights.

In *United States v. Fierson*, 419 F.2d 1020 (7th Cir. 1969), the Seventh Circuit held:

> [T]o justify admission into evidence of an accused's prior criminal acts to establish willfulness and intent, it is necessary that willfulness and intent be more than merely formal issues in the sense that the defendant is entitled to an instruction thereon. (Citation omitted) When, as in this case, the government has ample evidence to take the case to the trier of fact for its deliberation, a plea of not guilty cannot, by itself, be construed as raising such a keen dispute on the issue of willfulness and intent so as to justify admission of [extrinsic offense] evidence.

*Id.* at 1023. Thus, contrary to the holding in the present case, the Seventh Circuit does not permit the prosecution to supplement primary evidence of intent with evidence of prior acts *solely* by reason of the defendant's plea of not guilty. *See United States v. Kovic*, 684 F.2d 512, 515 (7th Cir.), *cert. denied*, 103 S.Ct. 304 (1982); *United States v. Fearns*, 501 F.2d 486, 490-91 (7th Cir. 1974).

Similarly, in *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975), the Sixth Circuit held that it was error to admit evidence of prior acts unless the defendant's criminal intent has been made a "genuinely contested issue" by an affirmative assertion of mistake or innocent state of mind. *Id.* at 1007; *see also United States v. Johnson*, 697 F.2d 735, 738-39 (6th Cir. 1983). *But see United States v. Hamilton*, 684 F.2d 380, 384-85 (6th Cir.), *cert. denied*, 103 S.Ct. 312 (1982). Hence, it appears that in the Sixth Circuit a defendant's mere plea of not guilty will

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[17] Indeed, the fact and extent of this conflict has been explicitly acknowledged by both the Fifth and Eleventh Circuits. *See United States v. Roberts*, 619 F.2d at 382 n.1; *United States v. Kopituk*, 690 F.2d 1289, 1334 (11th Cir. 1982), *cert. denied*, 103 S.Ct. 2089 (1983).

not in and of itself justify the admission of extrinsic offense evidence. Indeed, under *Ring* such evidence could only be admitted in rebuttal, after the defendant had asserted lack of criminal intent as an affirmative defense.

Finally, in *United States v. Powell*, 587 F.2d 443 (9th Cir. 1978), the Ninth Circuit held that a defendant's mere denial of participation in acts evidencing the crime charged does *not* raise the issue of intent. *Id.* at 448; *see also United States v. Coades*, 549 F.2d 1303 (9th Cir. 1977). If, as the Ninth Circuit held in *Powell*, a defendant's affirmative denial of participation in the criminal acts charged does not raise the issue of intent, it follows *a fortiori* that a mere plea of not guilty will not place the question of criminal intent in issue.

Even absent this direct conflict among the Circuits, review in this Court would be appropriate inasmuch as the rule announced in *Roberts*, and adopted in this case, presents important questions concerning an accused's rights to due process and trial by jury under the Fifth and Sixth Amendments to the United States Constitution. As previously noted, the district court allowed the prosecution to introduce evidence of a clearly prejudicial nature, not because Petitioner specifically challenged the government's evidence on intent, but merely because he exercised his constitutional right to plead not guilty and be tried by a jury of his peers. Only by affirmatively removing the issue of intent from the case, and thereby forfeiting his right to a jury finding on this issue, could Petitioner have avoided the introduction of clearly prejudicial matters.

The Sixth Amendment [18] to the United States Constitution confers upon every criminal defendant an absolute right to a trial by jury. *Duncan v. Louisiana*, 391 U.S. 145 (1968). This includes the right to have the jury con-

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[18] The Sixth Amendment, U.S. Const. amend. VI, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime have been committed. . . .

sider and determine each of the essential elements of the offenses charged in the indictment. *In re Winship*, 397 U.S. 358 (1970); *Christoffel v. United States*, 39[illegible] U.S. 84 (1949). In addition, the due process clause of the Fifth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364; *see also Screws v. United States*, 325 U.S. 91 (1945). It is therefore improper for the trial court to *require* stipulations or concessions which effectively preclude the jury from considering and determining all elements essential to the offenses charged. *See United States v. Hatrak*, 417 F. Supp. 316, 322 (D.N.J. 1976), *aff'd*, 564 F.2d 90 (3rd Cir. 1977), *cert. denied*, 435 U.S. 906 (1978).

By entering a plea of not guilty, Petitioner put the government to the burden of proving beyond a reasonable doubt every element of the crimes charged in the indictment. In applying the rule in *Roberts*, however, the lower courts presented Petitioner with a constitutionally unacceptable choice: either to affirmatively remove the issue of intent from the jury's consideration, or suffer the introduction of clearly prejudicial evidence without regard to the government's need for such evidence. Petitioner respectfully submits that to impose such a choice on a criminal defendant is contrary to this Court's holding in *In re Winship*, and impermissibly burdens the exercise of his Fifth and Sixth Amendments rights.

**C. The Court of Appeals' Ruling Affirming the Denial of Petitioner's Motion Pursuant To 18 U.S.C. § 3504 (1976) Is in Conflict With the Decisions of Other Federal Courts of Appeals and Presents an Important Question of Federal Statutory Construction.**

Pursuant to 18 U.S.C. § 3504 (1976), Petitioner moved the district court to require the government to affirm or deny the use of illegal electronic surveillance in its investigation leading to the prosecution of this case. Section 3504 provides, in pertinent part, as follows:

> [U]pon a *claim* by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim *shall affirm or deny* the occurrence of the alleged unlawful act.
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> As used in this section "unlawful act" means any act [involving] the use of any electronic, mechanical, or other device . . . in violation of the Constitution or laws of the United States . . . .

18 U.S.C. § 3504 (1976) (emphasis added). The district court denied Petitioner's motion, and the Court of Appeals affirmed, ruling that Petitioner's assertion of illegal surveillance was insufficient to constitute a "claim" within the meaning of section 3504, because it did not contain "a positive statement that unlawful surveillance did in fact take place," or demonstrate a direct causal link between such surveillance and the prosecution of this case (A15-16). As shown more fully below, this construction of the term "claim" appears to be contrary to the express purpose of section 3504 and conflicts with the decisions of other federal courts of appeals construing the statute.

Prior to the enactment of section 3504, defendants in criminal trials who suspected that the prosecution had relied upon illegal electronic surveillance were stymied in their efforts to establish the existence of such surveillance. The courts generally applied a rule, based in part on dicta in *Nardone v. United States*, 308 U.S. 338 (1939), which placed upon the defendant the burden of proving that illegal surveillance had been employed and that a substantial part of the government's case was derived from such surveillance. Only after the defendant tendered such proof did the burden shift to the government to show that its evidence had an independent source. *See, e.g., United States v. Pardo-Bolland*, 229 F. Supp. 473,

474-75 (S.D.N.Y. 1964); *United States v. Casanova*, 213 F. Supp. 654 (S.D.N.Y. 1963).

Behind this seemingly innocuous formulation, however, lay a peculiar paradox: the covert nature of electronic surveillance made the defendant's proof of such surveillance virtually impossible. Indeed, only infrequently did a defendant even attempt to make the requisite showing, and there appears to be no reported case finding that a defendant had met his burden. *See, e.g., United States v. Tanner*, 279 F. Supp. 457 (N.D. Ill. 1967); *United States v. Allied Stevedoring Corp.*, 165 F. Supp. 440 (S.D.N.Y. 1958).

Recognizing these inequities, Congress in enacting section 3504 as part of the Omnibus Crime Control Act and Safe Streets Act of 1968, 82 Stat. 211, as amended, 18 U.S.C. §§ 2510-2520 (1976), radically altered the allocation of burdens with respect to establishing electronic surveillance in order to protect victims of unlawful searches and seizures. *See Hearings on S.30 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 84, 104 (1970) (statement of Sen. McClennan, sponsor); *see also Gelbard v. United States*, 408 U.S. 41, 56 (1972). The essential purpose of adding section 3504 was to combine a limited and carefully articulated grant of power to intercept communications with an elaborate set of safeguards to deter abuse and to expunge its effects in the event that it should occur. The clear intent and purpose of Congress, however, has not been uniformly achieved and the seemingly straightforward requirement that the government affirm or deny claims of illegal electronic surveillance has produced considerable litigation.

Many of the cases involving section 3504 have dealt with the question of what constitutes a "claim" sufficient to trigger the government's obligation to affirm or deny. Inasmuch as the statute does not define the term "claim," and in the absence of guidance from this Court on the

issue,[19] lower federal courts have adopted a number of differing and often conflicting interpretations.

A number of Circuits have held that a defendant's mere assertion of illegal electronic surveillance is sufficient to trigger the government's obligation to affirm or deny. For example, in *In re Evans*, 452 F.2d 1239 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972), the District of Columbia Circuit held that section 3504 is triggered "by the mere assertion that unlawful wiretapping has been used against a party." *Id.* at 1247; *accord*, *United States v. James*, 609 F.2d 36 (2d Cir. 1979), *cert. denied*, 445 U.S. 905 (1980) (claim with a "colorable basis" will oblige government to respond); *United States v. Williams*, 580 F.2d 578 (D.C. Cir.), *cert. denied*, 439 U.S. 832 (1978) ("[t]o facilitate an accused's effort to demonstrate that evidence employable against him is contaminated by illegal surveillance . . . the Government, upon request, must affirm or deny . . ."); *United States v. Vielguth*, 502 F.2d 1257 (9th Cir. 1974) ("mere claim of such surveillance" is enough where claim is that defendant's conversations were unlawfully wiretapped; a more stringent standard applies to claims that conversations in which the defendant did not participate were wiretapped); *see also People v. Grieco*, 94 Misc.2d 1043, 406 N.Y.S.2d 426, *aff'd*, 98 Misc.2d 310, 413 N.Y.S.2d 821 (1978) (noting that under section 3504 "it is the government's obligation to affirm or deny . . . upon the mere assertion that unlawful wiretapping has been used").

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[19] Although this Court considered § 3504 in *Gelbard v. United States*, 408 U.S. 41, it never reached the question of what constitutes a sufficient claim to require the government to search its files to determine whether it has conducted illegal electronic surveillance. The question presented in *Gelbard* was whether grand jury witnesses could rely upon 18 U.S.C. § 2515 (1976) as a defense to contempt charges imposed for their refusal to testify. Since the government had acknowledged conducting illegal electronic surveillance, it was unnecessary to reach the question of whether a sufficient claim had been made. 408 U.S. at 46-47.

In conflict with the above cases is the ruling in the present case and those cases upon which the Court of Appeals relied in reaching its decision. *See In re Baker*, 680 F.2d 721 (11th Cir. 1982); *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated on other grounds*, 439 U.S. 810 (1978); *United States v. Tucker*, 526 F.2d 279 (5th Cir.), *cert. denied*, 425 U.S. 958 (1976). These cases suggest that a claim of illegal wiretapping will suffice only if it amounts to a "positive statement that unlawful surveillance did in fact take place". Thus, in this case, the Court of Appeals concluded that what was required in Petitioner's affidavit, filed in support of his section 3504 motion, was "an unequivocal statement that his calls were actually monitored" (A15).

The rule applied by the Court of Appeals in this case, as fashioned from *Baker*, *Rubin*, and *Tucker*, is at best a modified version of the pre-section 3504 rule that a defendant must prove the occurrence of surveillance. The covert nature of electronic surveillance, which made it virtually impossible for a defendant to carry his burden before the enactment of section 3504, also makes it virtually impossible for a defendant to gather the evidence necessary for an "unequivocal statement" that surveillance has occurred, or show a direct causal link between such surveillance and his prosecution. The rule adopted in the present case thus arbitrarily forecloses resort to section 3504, limiting the statute's availability to those claimants fortunate enough to have been targets of sloppy government investigations. In this respect, it should be noted that a claimant who possesses proof of illegal electronic surveillance and, therefore, is able to make an unequivocal statement that surveillance occurred, is not dependent upon an acknowledgement of government wrongdoing. Rather, he may proceed directly with a motion to suppress. 18 U.S.C. § 2518(10)(a) (1976). Such a claimant is thus precisely the person who least needs the protection which section 3504 was enacted to provide.

Petitioner respectfully submits that the interpretation of the term "claim" adopted by the Court of Appeals in the present case vitiates the protections afforded by section 3504 to victims of illegal electronic surveillance and is contrary to the plain intent of Congress. In any event, it is apparent that the denial of Petitioner's motion under 18 U.S.C. § 3504 (1976) involves a substantial question of statutory construction which this Court has never addressed and with respect to which the various courts of appeals have reached conflicting conclusions. The instant case presents an opportunity for this Court to fashion a rule which properly balances the rights of the criminal defendant under section 3504 against the needs and resources of law enforcement agencies.

## CONCLUSION

It is respectfully submitted that the issues presented in this petition are both substantial and important, and that this Court should grant a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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## APPENDIX

**Memorandum Opinion and Order of the United States Court of Appeals for the Eleventh Circuit June 23, 1983**

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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

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No. 82-8398

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

DEWEY T. NABORS, JR.,
*Defendant-Appellant.*

June 23, 1983

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Appeal from the United States District Court for the Middle District of Georgia

Before RONEY and HILL, Circuit Judges, and MORGAN, Senior Circuit Judge.

RONEY, Circuit Judge:

Dewey T. Nabors, Jr. was convicted of conspiracy, possession and importation of marijuana and methaqualone. 21 U.S.C.A. §§ 841(a)(1), 846, 952(a), 963; 18 U.S.C.A. § 2. On appeal, he asserts four errors by the district court: (1) admission of laboratory analyses of the contraband which had been destroyed before Nabors

had an opportunity to examine it, (2) admission of evidence that Nabors, as a named insured of the airplane involved in the drug smuggling, failed to file an insurance claim on the airplane or otherwise cooperate with the insurance company, even though the aircraft sustained extreme damage in the drug operation, (3) admission of evidence showing Nabors' involvement in similar illegal activity four years earlier, and (4) denial of Nabors' motion to compel the government to affirm or deny the monitoring of international phone conversations in which Nabors discussed drug smuggling. We affirm.

A brief account of the factual background to this case is helpful before going into more detail on the facts and arguments specific to each issue. On April 13, 1980 Michael Warner landed an airplane, leased by Nabors, in middle Georgia near the town of Unadilla. Warner, flying alone, chose the particular landing site, a cropdusting strip, because bad weather prevented him from landing at his intended destination. Warner immediately set the plane on fire, inadvertently causing local law enforcement officers to arrive at the scene. The officers were able to save some of the airplane's contents, which they suspected to be marijuana and methaqualone. They arrested Warner, who was convicted in state court of drug charges.

Warner was the key government witness at Nabors' subsequent trial in federal court. He testified that Nabors had hired him to fly to Colombia, pick up marijuana and methaqualone from Nabors, and bring it back to Georgia. Nabors did not take the stand in his own defense, electing simply to attack Warner's credibility and other aspects of the government's case.

1. *Destruction of the Evidence*

Two months before Nabor's trial, the Georgia Bureau of Investigation (G.B.I.) destroyed the alleged contraband taken from the burning plane. As a result, federal au-

thorities could not comply with Nabors' motion to inspect and test the prosecution's evidence. Nabors argues the government's actions deprived him of due process, requiring the exclusion at trial of the laboratory analyses of the seized material and the dismissal of at least the substantive counts of the indictment.

Clearly a defendant in a drug prosecution has a due process right to have an expert of his choosing perform an independent analysis on the seized substance. *See United States v. Gaultney*, 606 F.2d 540, 545 (5th Cir. 1979), *modified on other grounds*, 615 F.2d 642 (5th Cir. 1980), *rev'd on other grounds sub nom, Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *cf. Barnard v. Henderson*, 514 F.2d 744, 746 (5th Cir. 1975) (criminal defendant has right to examine, through his own expert, critical evidence subject to varying expert opinion). The government has a concomitant responsibility to try in good faith to preserve important material and to locate it once the defendant moves for discovery. *Armstrong v. Collier*, 536 F.2d 72, 78 (5th Cir. 1976); *United States v. Bryant*, 439 F.2d 642, 651 (D.C.Cir.1971). The government does not dispute its responsibility under the law.

The issue here is whether the *mistaken* destruction of the material, so that the defendant cannot examine it, requires the exclusion of testimony as to the nature of the material by the government witness who tested it. The first question is whether Nabors is entitled to exclusion under a *per se* rule since the identification of the material as marijuana and methaqualone was central to the prosecution, at least for the substantive offenses. We think not. Two cases are helpful in this conclusion. The recent Supreme Court decision in *United States v. Valenzuela-Bernal*, 458 U.S. ——, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982), involved the government's deportation of potential witnesses, thus putting them beyond the subpoena reach of the defendant. The Court, in a thorough discussion

of related cases involving the deprivation of evidence to the defendant, held there to be no due process violation unless the defendant made some plausible showing that the evidence would have been material and favorable to his defense. *Id.* at ——, 102 S.Ct. at 3448, 73 L.Ed.2d at 1205-06. The seminal case in our Circuit involved the government's refusal to allow the defendant to inspect the alleged murder weapon and a 75% destroyed bullet which killed the victim. Government ballistics experts testified that the bullet came from defendant's gun. The Court reversed the defendant's conviction, reasoning the bullet was "a piece of critical evidence whose nature is subject to varying expert opinions." *Barnard v. Henderson*, 514 F.2d at 746.

There is no evidence in this case to suggest that experts would have disagreed as to the identification of the seized material. Nor in the experience of this Court in cases of this kind, unlike bullet cases, have we found varying opinions among experts as to the identification of these two substances.

Rather than a *per se* rule of exclusion, the test in this Circuit focuses on "the materiality of the evidence, the likelihood of mistaken interpretation of it by government witnesses or the jury, and the reasons for its nonavailability to the defense." *United States v. Herndon*, 536 F.2d 1027, 1029 (5th Cir. 1976). Other circuits have also looked to the government's culpability and the prejudice to the defendant. *See United States v. Picariello*, 568 F.2d 222, 227 (1st Cir. 1978); *cf. United States v. Loud Hawk*, 628 F.2d 1139, 1152-53 (9th Cir. 1979) (en banc) (majority opinion on issue by J. Kennedy) (looking to these factors but indicating the issue is generally not one of constitutional dimensions), *cert. denied*, 445 U.S. 917, 100 S.Ct. 1279, 63 L.Ed.2d 602 (1980) —— U.S. ——, 103 S.Ct. 755, 75 L.Ed.2d —— (1983). Without discounting the right of defendants to examine the material they are charged with possessing, we hold that where the ma-

terial has been destroyed in spite of the government's good faith attempt to preserve it, testimony as to the nature of the material need not be suppressed absent some showing that the testing of the material by another expert would have been reasonably likely to produce evidence favorable to the defendant.

Nabors admits there is no indication that the government acted with improper motive when it destroyed the alleged contraband. *See United States v. Herndon*, 536 F.2d at 1029. The destruction appears to have been a mistake, which occurred despite the efforts of federal and local law enforcement officials to have the evidence preserved. Briefly, after Michael Warner's trial in state court, the local sheriff's office returned the seized material to the Georgia Bureau of Investigation laboratory with instructions that it should be preserved. Prior to Nabors' indictment, an Assistant United States Attorney spoke by telephone to the G.B.I. agent in charge of the case, requesting that G.B.I. preserve the evidence for use in a federal prosecution. Unfortunately, a communication breakdown resulted in the destruction of the evidence by the director of the G.B.I. laboratory. Thus, while in retrospect the government perhaps should have done more to ensure the preservation of the evidence, it clearly did not act "for the purpose of inflicting a disadvantage upon the defendant[]," *United States v. Gordon*, 580 F.2d 827, 837 (5th Cir.), *cert. denied*, 439 U.S. 1051, 99 S.Ct. 731, 58 L.Ed.2d 711 (1978), 439 U.S. 1079, 99 S.Ct. 860, 59 L.Ed.2d 49 (1979), or as part of a policy of "systematic non-preservation" of evidence, *United States v. Bryant*, 439 F.2d at 652. The government agents knew the law and acted accordingly. Thus exclusion is not necessary to sanction or instruct the government for a violation of law, as is the rationale for some exclusionary rules.

There is virtually no likelihood that the absence of the alleged contraband affected the verdict in a manner prejudicial to Nabors. *United States v. Gordon*, 580 F.2d at

837. The government, through various witnesses, explained the absence of the evidence to the jury. It presented overwhelming evidence showing the substances were indeed marijuana and methaqualone. The G.B.I. laboratory director testified that he tested the substances and found them to be the two drugs in question. The prosecution presented photographs of the seized material. The local law enforcement agent who removed the material from the burning plane testified that he smelled marijuana. The pilot, Michael Warner, testified the cargo he picked up from Nabors in Colombia consisted of marijuana and methaqualone. According to Warner, Nabors had agreed to pay him $50,000 to transport 900 pounds of marijuana. Nabors had a full opportunity to cross-examine these witnesses. It seems clear that the absence of the material did not deprive Nabors of any useful evidence. He presented no evidence suggesting the material was anything other than the contraband charged. In short, the absence of the seized evidence did not deprive Nabors of a fundamentally fair trial. *See United States v. Herndon*, 536 F.2d at 1030.

2. *Admission of Evidence of Prior Silence*

The airplane was insured. At trial, the prosecution presented, in its case in chief, evidence that Nabors had failed to respond to a request by the insurance company for a statement as to Nabors' involvement in the use and damage of the aircraft. Nabors immediately objected to the evidence, asserting that its introduction violated the self incrimination and due process clauses of the fifth amendment to the Constitution. Emphasizing that he did not intend to testify in his own behalf, Nabors reasoned that the evidence improperly enabled the prosecution to comment on his silence and allowed the jury to infer guilt therefrom.

We decide the constitutional issue on the assumption that the evidence was relevant. Nabors objected and ap-

pealed purely on fifth amendment grounds. We generally do not review evidentiary rulings except on grounds asserted in the contemporaneous objection. *See United States v. Arteaga-Limones*, 529 F.2d 1183, 1198-99 (5th Cir.), *cert. denied*, 429 U.S. 920, 97 S.Ct. 315, 50 L.Ed.2d 286 (1976); *United States v. Fendley*, 522 F.2d 181, 185-86 (5th Cir. 1975). In any event, questions of relevance fall within the broad discretion of the trial court. *United States v. Linetsky*, 533 F.2d 192, 204 (5th Cir. 1976); *United States v. Dobbs*, 506 F.2d 445, 447 (5th Cir. 1975).

The constitutionality of admitting the evidence is difficult to decide. The leading Supreme Court cases on the prosecution's use of a defendant's silence are not directly on point. In *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the Court, in a *post-arrest* silence case, held the government cannot, consistent with due process, bring up at trial a defendant's silence after receiving *Miranda* warnings, even for impeachment purposes. *See also United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975) (same result reached based on Supreme Court's supervisory power over federal courts). In *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), however, the Court held that the government can use *pre-arrest* silence to impeach a defendant. *See also Lebowitz v. Wainwright*, 670 F.2d 974 (11th Cir. 1982). The present case, involving pre-arrest silence, differs in two critical respects from *Doyle* and *Jenkins* and the other cases concerning the use of a defendant's silence. First, the government introduced evidence of defendant's silence in its direct case in a trial in which the defendant never testified. In virtually all the major prior silence cases, the prosecution raised the issue on cross examination or rebuttal in an effort to impeach the defendant-witness. The logical theory of admissibility in this context is that the silence amounts to a prior inconsistent statement. Second, the silence here

did not occur in response to a governmental inquiry as is usually the fact in cases dealing with the point. A private insurance company asked Nabors to cooperate in its own investigation of the damage to the plane. The insurer sent its inquiry one and one-half years before the indictment of Nabors. No *Miranda* warnings were given, and none had to be.

Under one view, this latter distinction might be dispositive of the fifth amendment argument in this case. In a concurring opinion in *Jenkins*, Justice Stevens, joined by retired Justice Stewart, wrote:

> The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police . . . When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment.

447 U.S. at 243-44, 100 S.Ct. at 2132 (Stevens, J., concurring) (footnote omitted). According to Justice Stevens, the prosecution can raise prior silence, even if the defendant does not elect to testify, as long as the evidence is relevant and the silence was not in response to governmental inquiry. *Id.* at 244 n.7, 100 S.Ct. at 2132 n.7.

A majority of the Supreme Court has never adopted Justice Stevens' analysis, however, so that theory cannot control the decision here. Only one lower court has to

our knowledge adopted the Stevens approach. *United States v. Robinson*, 523 F.Supp. 1006, 1010-11 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir. 1982). *Robinson* held that the prosecution did not infringe defendant's fifth amendment privilege by raising, in its case in chief in a counterfeiting trial in which defendant did not testify, defendant's silence in the face of an implicit accusation by a cashier that he had handed her counterfeit money. Even there, the evidence might be admissible without the Stevens rationale. *Robinson* involved silence combined with action at the time the crime was committed. When the *Robinson* cashier handed back the tendered bills and asked for real money, the defendant, without saying anything, handed the cashier genuine money. The *Robinson* decision differs from the case at bar in that here the silence occurred independent from the commission of the crime.

We premise our decision that no reversible error occurred in this case on four rationales. *First*, it seems clear that if Nabors had made some statements to the insurance company, the prosecution could have used them, as not having been compelled by the government. *See United States v. Moeller*, 402 F.Supp, 49, 53-56 (D.Conn. 1975). Presumably, if it could have used Nabors' statements against him, assuming relevancy, it should be able to use his silence against him, assuming relevancy. The principle that runs through the cases involving silence is that the government cannot use a defendant's assertion of the constitutional privilege against self-incrimination to incriminate him. *E.g.*, *Doyle v. Ohio*, 426 U.S. at 618, 96 S.Ct. at 2245. Silence without the claim of constitutional privilege does not implicate that principle of fairness. The Supreme Court has held that the fifth amendment privilege " is not self-executing," at least where, as here, the inquiry does not obviously call for an incriminating answer. *Roberts v. United States*, 445 U.S. 552, 559, 100 S.Ct. 1358, 1363, 63 L.Ed.2d 622 (1980). *See also*

*United States v. Kordel*, 397 U.S. 1, 9-10, 90 S.Ct. 763, 768, 25 L.Ed.2d 1 (1970); *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 113, 47 S.Ct. 302, 306, 71 L.Ed.2d 560 (1927). Nabors simply did not respond to the insurance company's general request for an account of his involvement with the plane. He never asserted the privilege. Because he did not claim it at the time of the silence, he could not claim it at trial.

*Second*, the evidence here is more than testimonial in nature. Certainly the actions of a defendant which are inconsistent with innocence are admissible without regard to the fifth amendment privilege. Here the point the government was presenting to the jury was Nabors' failure to make a claim for the insurance proceeds to which he was entitled if he was innocent of criminal involvement with that plane. In closing argument, government counsel, commenting on defense attorney's suggestions that Nabors did not grant Mike Warner permission to use the plane for criminal activity, said:

> If you believe that, don't you reckon Mr. Nabors would've said, "Mike, you took my airplane and committed a crime in it. I don't want nothing to do with you." . . . And if it was somebody taking his plane without authorization and running off and committing a crime in it and burning it up, don't you know he'd come up to the insurance company and say, "Look here, I've got a loss that's covered by your insurance, and I demand payment." He didn't do that.

Viewed as action, not silence, the evidence does not implicate the fifth amendment privilege against compelled testimony. We need not concern ourselves as to whether there were innocent explanations for this action that rob it of evidentiary value. None were argued.

*Third*, we are quite aware of the absence of cases which allow the use of silence in the government's case in chief.

Just two and one-half years ago, the Second Circuit commented that it could find "no decision permitting the use of silence, even the silence of a suspect who has been given no *Miranda* warnings and is entitled to none, as part of the Government's direct case." *United States v. Caro*, 637 F.2d 869, 876 (2d Cir. 1981) (suggesting the district court's admission of evidence of silence in that case might have been error, but holding the error harmless). *See also United States v. Lewis*, 651 F.2d 1163, 1165-69 (6th Cir. 1981) (reversing conviction where government agent testified on direct to defendant's silence following *Miranda* warnings). The government cites only one case in which a court allowed the prosecution to comment on a defendant's silence in its case in chief. *United States v. Robinson*, 523 F.Supp. at 1011, the case of silence combined with action of the time of the crime's commission.

Even with the lack of authority for admissibility, however, we cannot figure out why the case should be reversed because of the admission of this evidence. Relevant evidence is, as a general proposition, admissible unless there is some reason for its exclusion. Fed.R.Evid. 402. That the evidence might have called attention to defendant's failure to testify, the general thesis of the argument on appeal, is not persuasive. Much incriminating evidence presented by the prosecution in criminal cases cries out for an explanation by the defendant and points up his failure to testify. The two cases relied upon by defendant, *Helton v. United States*, 221 F.2d 338, 341-42 (5th Cir. 1955), and *United States v. Sprengel*, 103 F.2d 876, 882-83 (3rd Cir. 1939), are readily distinguishable. In *Helton* the questions were asked by a police officer; in *Sprengel* by a government postal inspector. Nabors has given us no persuasive justification for reversing the trial court on this point.

*Fourth*, the prosecution presented substantial evidence of defendant's guilt, even without the evidence of Nabors'

silence in response to the insurance inquiry. Michael Warner testified in detail about Nabors' hiring him to transport the marijuana from Colombia. He also testified to prior similar drug smuggling operations headed by Nabors. The government presented some corroborating testimony, especially about the prior similar acts, including a recording of a telephone conversation between Nabors and Warner in which they discussed a landing site. Nabors presented virtually no rebuttal evidence. In light of the other evidence of guilt, admission of the evidence amounted to harmless error, if error at all. *See United States v. Resnick*, 483 F.2d 354, 356-58 (5th Cir.), *cert. denied*, 414 U.S. 1008, 94 S.Ct. 370, 38 L.Ed.2d 246 (1973).

3. *Admission of Evidence of Similar, Prior Acts*

Over Nabors' objection, the district court admitted evidence that, four years before the drug smuggling operation charged, Nabors had been engaged with Warner in a series of virtually identical operations. The government's theory of admissibility, which the district court evidently accepted, was that the evidence went to defendant's intent to commit the crimes charged.

Under Fed.R.Evid. 404(b), evidence of other crimes is admissible to establish, among other things, intent but is inadmissible to show the defendant's character. To be admissible, the evidence must satisfy a two-part test:

> First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice . . . .

*United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc) (footnote omitted), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979).

Nabors acknowledges the evidence went to an issue other than character. The extrinsic offenses, involving related drug smuggling operations, require the same intent as the charged offenses, and, based on Warner's detailed testimony and the corroborating evidence, the jury could find that Nabors committed the extrinsic offenses. *United States v. Beechum*, 582 F.2d at 913.

The question is whether the danger of unfair prejudice substantially outweighed the evidence's probative value. The answer to this question is generally for the trial judge. "[T]he decision to admit extrinsic [crime] evidence can be disturbed only for an abuse of discretion." *United States v. Benton*, 637 F.2d 1052, 1056 (5th Cir. 1981).

The evidence had substantial probative value. Nabors' assertion to the contrary, his criminal intent appears to have been very much in issue. Through cross-examination of government witnesses, Nabors suggested that he had not operated the airplane in a furtive manner indicative of criminal conduct. The defense brought out, for example, that the insurance policy on the plane provided detailed information about Nabors and that Nabors readily identified himself to airport employees. In his closing argument, defense counsel directly raised the question of criminal intent: "A friend [Nabors] lets him [Warner] fly, there's nothing wrong with that." Nabors evidently hoped the jury might conclude he had nothing to do with the illegal drug smuggling operation. In any event, the former Fifth Circuit has held that in a conspiracy case in which the defendant pleads not guilty, extrinsic offense evidence is admissible in the government's case in chief unless the defendant has affirmatively removed the issue of intent. *United States v. Roberts*, 619 F.2d 379, 383 (5th Cir. 1980).

The evidence cannot be attacked as unnecessary or cumulative. Nabors aggressively challenged Warner's credibility, emphasizing that the government's key wit-

ness was an admitted perjurer and convicted felon. In addition to Warner's testimony about the prior offense, the government introduced a tape recording of a telephone conversation between Nabors and Warner just prior to some of the alleged prior offenses in which the two men discussed a landing site for an upcoming flight by Warner. Thus the evidence of the extrinsic drug smuggling operations, which also entailed an airplane flown by Warner, bolstered the potentially shaky primary evidence of intent.

Balanced against its probative value, the extrinsic offense evidence does not seem to have been unduly or unfairly prejudicial. The judge properly instructed the jury both at the time the government introduced the evidence and prior to sending the jury out that it could not consider the extrinsic crime evidence as proof that Nabors committed the charged offenses. He stated the evidence should be considered only in regard to intent. The limiting instruction minimized the potential for unfair prejudice. *United States v. Black*, 595 F.2d 1116, 1117-18 (5th Cir. 1979).

4. *Denial of Motion to Compel Government to Affirm or Deny Existence of Wiretap Interceptions*

Pursuant to 18 U.S.C.A. § 3504, Nabors moved just prior to trial to require the prosecution to disclose the use of any electronic surveillance or monitoring in the criminal investigation. The district court denied the motion, terming it both insufficient and untimely.

The controlling statute, 18 U.S.C.A. § 3504, provides in effect that when a defendant claims evidence is inadmissible as illegally obtained by use of an electronic device, the government must affirm or deny the use of the electronic device.

> (a) In any trial . . . before any court . . . of the United States—

> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;
>
> • • • •
>
> (b) As used in this section "unlawful act" means any act [involving] the use of any electronic, mechanical, or other device . . . in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

The claim to trigger this section must be more than an allegation that unlawful surveillance may have occurred. While a mere assertion of illegal wiretapping unsupported by evidence may suffice, it must be a positive statement that unlawful surveilliance did in fact take place. *In re Baker*, 680 F.2d 721, 722 (11th Cir. 1982); *United States v. Rubin*, 559 F.2d 975, 989 (5th Cir. 1977), *judgment vacated and remanded on other grounds*, 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978), *rev'd in part on other grounds on remand*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864, 100 S.Ct. 133, 62 L.Ed.2d 87 (1979); *United States v. Tucker*, 526 F.2d 279, 282 (5th Cir.), *cert. denied*, 425 U.S. 958, 96 S.Ct. 1738, 48 L.Ed.2d 203 (1976).

Nabors submitted two affidavits in support of his motion. One, by his attorney, stated essentially that government documents revealed a policy of the National Security Agency (NSA) to monitor international telephone conversations. The other, signed by Nabors himself, stated that Nabors had been a party to international telephone calls concerning the subject of the indictment. It continued:

> [B]ased on NSA's policy of surveillance, I am informed and *believe*, and thereon allege, that some or

> all of my aforementioned telephone conversations with persons located in Central and South America, were, *in all likelihood*, intercepted by the United States of America (emphasis added).

Without considering the timeliness of Nabors' motion, we agree with the district court that it is legally insufficient. *First*, Nabors' affidavit is devoid of an unequivocal statement that his calls were actually monitored. *See, e.g., United States v. Rubin*, 559 F.2d at 989 (statement by defendant that he has "reason to believe" his conversations were monitored is insufficient). *Second*, Nabors did not allege, as the statute suggests, a causal link between the monitoring and prosecution. Rather, he asked the court to "make inquiry [to] determin[e]" whether any evidence was the fruit of illegal surveillance.

AFFIRMED.

**Order of the United States Court of Appeals for the Eleventh Circuit, August 15, 1983, Per Curiam, Denying Defendant's Petition for Rehearing and Suggestion for Rehearing En Banc**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 82-8398

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
versus
DEWEY T. NABORS, JR.,
*Defendant-Appellant.*

---

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 23, 11 Cir., 1983, —— F.2d ——).
(August 15, 1983)

Before RONEY and HILL, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on

the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

**Notice of Appeal**
**June 28, 1982**

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IN THE DISTRICT COURT FOR THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA AMERICUS DIVISION

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Criminal No. 81-5-AMER

UNITED STATES OF AMERICA

vs.

DEWEY T. NABORS, JR.

NOTICE OF APPEAL

Notice is hereby given that Dewey T. Nabors, Jr., Defendant above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment of conviction and sentence entered in this action on the 28th day of June, 1982.

This 28th day of June, 1982.

COOK & PALMOUR

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BOBBY LEE COOK

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By: /s/ James M. Wootan
JAMES M. WOOTAN
Counsel for Defendant

**A true and certified copy.**
**This June 29, 1982.**

**GIRARD W. HAWKINS, Clerk**
**U.S. Dist. Court, MD Ga.**

**By: /s/ Pearl C. Wilkes**
**Deputy Clerk**

**Excerpts of Transcript of Hearing, May 28, 1982 relating to the District Court's Denial of Defendant's Motion to Compel**

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA AMERICUS DIVISION

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Criminal No. 81-5-AMER

UNITED STATES OF AMERICA

vs.

DEWEY T. NABORS

---

PRESIDING: HONORABLE J. ROBERT ELLIOTT, JUDGE

---

APPEARANCES

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[2] CRIMINAL NUMBER 81-5-AMER, UNITED STATES OF AMERICA VERSUS DEWEY T. NABORS, WAS BROUGHT ON FOR MOTIONS ON MAY 28, 1982 AS FOLLOWS:

THE COURT: We had been requested to have a hearing this morning on a motion or motions filed by the defendant in the case of United States versus Nabors, Criminal Number 81-5, the Americus Division. Mr. Erion is present representing the defendant; Mr. Adams is present representing the government. I suppose the first thing I ought to do, since I haven't seen it, is read the motion. That seems reasonble. So I'll take a moment to do that.

All right. I'll hear from you, Mr. Erion.

MR. ERION: Your Honor, we have, in addition to the motion that we recently filed regarding electronic surveillance, I have a couple of other matters I want to take up with you.

Your Honor, the motion we filed today, as you've just read, addresses the requirements of 18 USC 3504, which essentially states that if a defendant asserts that he has been the target of electronic surveillance, the subject of electronic surveillance by the government and files a motion to that effect, the government has to either affirm or deny that that occurred. The case law on the matter is fairly straightforward. I think one of the leading cases in the Fifth Circuit arose in this district, [3] United States versus Tucker, which is at 526 F. Second, 279. And the Tucker case specifically holds that as to a criminal defendant in a criminal case, that his claim of surveillance is an assertion that it occurred. It's sufficient to trigger requirements of the statute. We have to keep in mind that the largest majority of these type cases arose in a Grand Jury context in which the courts were concerned with delaying the ongoing, continuing Grand Jury investigations. In some of those instances, they required a stronger claim than that. Tucker also pointed out that a mere naked claim would not necessarily be enough, al-

though it did cite with approval the Second Circuit, the Ninth Circuit and the DC Circuit line of cases.

I would like to cite a couple of those cases to Your Honor in a moment. What we have in this situation is not a mere naked claim. It's based on factual documents that are matters of record in the Senate of the United States and in the United States District Court for the District of Columbia, that cover the period included within the indictment and further cover the period that Mr. Adams has informed us that he is going to try to establish through prior acts testimony. Now, whether he'll be able to get the prior acts in is a question Your Honor will have to direct at trial, but he's indicated a possible intention, attempt to do so.

[4] The DC Circuit, in the case In Re Evans, which was cited in the Tucker case, stated that in his view when mere assertion an unlawful wiretapping had been used against a party, it requires the government to make the next move and that the next move required a search of the government's records to determine if this was the case. That appears at Page 1247 and in 452 F. Second.

Your Honor, the real crux of this situation is whether or not there was anything that was possible, there was anything that could have resulted in the evidence the government's going to use in this case, that came from unlawful electronic surveillance. I think it's undisputed in the Senate report and undisputed from the affidavits filed in the Salisbury case by the Secretary of Defense and by Mr. Yeates, that the National Security Agency utilizes electronic surveillance of international telecommunications, and they utilized that without any court order whatsoever. They have very consistently over the years been very reluctant to explain exactly what they did. But it seems to be clear that this was done. The Senate report goes into greater detail about it.

And then, after all that, in 1976 United States Senate and United States Congress chose to take no action and put no legislative bounds on it. And, in fact, when

they passed the Foreign Intelligence Surveillance Act in [5] 1978, the House of Representatives, in its report—which appears in House Report 1283—even recognized that the act did not address this problem; that it did not protect the rights of United States citizens who made phone calls to foreign countries. And it's also clear that in the past the National Security Agency had disseminated information to federal law enforcement agencies. On page 743 of the Senate Report, they describe the method of this being done. It says lists of words and phrases, including the names of individuals and groups, have long been used by the National Security Agency to collect information of intelligence value from intercepted communications. These lists are referred to as watch lists by NSA and the agencies requesting intelligence information from them such as Federal Bureau of Investigation, Central Intelligence Agency, Bureau of Narcotics and Dangerous Drugs, Secret Service and Department of Defense.

To a certain extent the Senate Report also, Your Honor, makes clear—and I have to say this up front—that dissemination to law enforcement agencies was somewhat curtailed in the mid 1970's, but it also makes it clear that this is a matter of internal NSA policy, is not a matter of legislative mandates, and NSA can change that at anytime internally. It can change it by mandate of any particular administration in Washington that thinks [6] that—the Drug Enforcement Administration or Customs or whoever needs this information. And in the mid 1970's, in fact, NSA was feeding a substantial amount of information to the Bureau of Narcotics and Dangerous Drugs. The Senate Report makes that clear. And considered that—for reasons that escape me—as being foreign intelligence.

We think we have made the necessary showing to indicate that our client may have had conversations intercepted. We think that it is now—the burden is on the government to make the required search: if they find

any such conversation, to determine what use if any was made of them. The mere assertion of Mr. Adams that he doesn't know of anything or even the case agent in this case, as I read the law, wouldn't be enough because you don't know what filtered down and made its way into the investigation ultimately. And I was concerned about this when we started trying to track this down, seeing if it was continuing in 1980, which we finally were able to determine. I'm even more concerned now that I'm informed we're looking over a potential four-year period of evidence in this thing, from '76 to '80 in the case. And I just find it inconceivable that some of our client's telephone calls, related to the type activity in the indictment, were not intercepted. And if that's the case, the government then owes the duty to find those calls and owes the duty to tell [7] us whether or not any use was made of them, even if Mr. Adams doesn't know. I'm sure that would be his position, that he doesn't know of anything like that. It would've been my position when I was in his situation. But the case law presumes that the prosecuting attorney is not going to know about this. That is quite obvious from requirements of searches. I think that covers my basic position on this motion, Your Honor.

MR. ADAMS: Your Honor please, let me first point out that if the Court was to find that the claim made by Mr. Nabors was sufficient under Section 3504, that there is, in fact, a procedure by which we can go to the National Security Agency and get a response from them. However, the procedure—called an all agency check—requires a court order and takes six to eight weeks to be done. This is what I'm told by the authority, the person in the Department of Justice who handles these things from all over the country, which raises or prompts this observation, and that is the timing of filing of this motion. It was filed this week. Mr. Nabors was arraigned here February 17, about three months ago, which would've allowed time to go over—this thing could've been responded to without delaying the trial date, which

is a week from Monday. It appears to me to be a delaying tactic and fishing expedition. The only position that I [8] can see that the government can take, to avoid a continuance of the trial, to allow this check to be done, is the position that the claim—as made by Mr. Nabors and Mr. Erion—is insufficient and, therefore, does not require the government to affirm or deny whether this alleged surveillance monitoring actually occurred.

The law in the Fifth Circuit, the Tucker case as cited by Mr. Erion, goes a little bit further than he noted. It says that an assertion must, at a minimum, be a positive statement that unlawful surveillance has taken place. A generalized motion, based on the possibility of such surveillance, is not a claim, quote, under 3504.

Another Fifth Circuit case, there's an allegation that surveillance may have occurred, will not suffice. And that's the position of the government, that the claims here are nothing more than such surveillance may have happened. It's pure speculation and conjecture.

Mr. Nabors' affidavit says nothing more than he made international phone calls when he discussed, presumably, drug smuggling, the subject matter of the indictment and other prior acts that he's described in his own affidavit. But that's all he says. He does not specify dates. He does not specify places. He does not specify phone numbers. If Mr. Nabors called Colombia, South America and talked to somebody there about setting [9] up a load of marijuana, I dare say he didn't use his name. That's not the nature of the drug business, and I think the Court can take judicial notice of that. That's the way this business works. If he did make such a phone conversation and all we had was his name, there's no way we can find it. In other words, his affidavit is just not sufficient itself to allow a check to be done. It just lacks specificity as to every type detail that would be needed.

Mr. Erion's affidavit, of course, addresses the matter of the National Security Agency's policy or past or maybe present activity concerning monitoring of inter-

national telephone calls. Based on his obviously well-done research into the matter, it's apparent that the National Security Agency has, in fact, monitored international telephone calls. There's no suggestion—I don't think—that they monitor every single international phone call made every day. I don't have any figures for the Court, but the numbers involved would have to be astronomical. And I don't know as a practical matter that there's any way they could listen in on every phone conversation that's made.

So whether Mr. Nabors' phone conversations to Colombia, Venezeula and Panama may have been monitored, as I say, is speculation and conjecture. The odds of that happening seem to me to be very small. In other words, he [10] cannot say positively that he has been monitored, and that under the criteria is what's necessary. And since he can't do that, the claim is insufficient.

The National Security Agency exists, as far as I can determine, for foreign intelligence purposes. They did earlier, as Mr. Erion pointed out, have some dissemination to the predecessor to DEA, but that was terminated so far as the records show. Under the statute that Mr. Erion referred to, the Foreign Intelligence Surveillance Act passed in 1978, of course, defines foreign intelligence, and clearly this would not cover the drug business. It also imposes the requirement of minimization, and that is that there is an obligation on the government not to invade the privacy of U.S. citizens who may be making international phone calls in matters unrelated to national security.

So the government's position, very simply, is that the claim, as made, is not sufficient. I suggest to the Court that, if it is a sufficient claim, then every drug smuggler in this country—almost all of them would have to make international telephone calls—automatically have a right to force the government to go plundering around in the National Security Agency, to see what records may or may not exist. I would suggest that this is not what

Congress intended by passing 3504 and is not something that the Court should impose on the government. [11] That is the requirement that every drug smuggler merely has to say he had an international phone call; therefore, the government must be put to the task of going to the NSA and other agencies.

I will state further—and Mr. Erion anticipated that I might say—so far as I know, the evidence in this case is not derived from any monitoring of any kind. I've talked to every agent involved. I've read every report I could find on Mr. Nabors. So far as I can tell, the case derived from observations of his activities in the acquisition of airplanes and hiring of pilots and preparation to go to South America and pick up drugs, upon return getting caught or plan getting seized or whatever. And I think after the trial of the case, the Court will be in a better position to see that. But as I say, so far as I can observe, this motion—which is a novel one—best I can determine, there's never been a motion filed stating a claim in quite the terms that this claim is stated. So far as I can see, it's a delaying tactic and fishing expedition, and we would urge the Court to find that the claim, as stated, is insufficient and, therefore, does not require the government to confirm or deny.

MR. ERION: First, I would like to point out one thing. I recognize this motion is not as early as Mr. Adams would [12] like, and I also recognize exactly what he says—as far as I've been able to determine, it is unique.

THE COURT: Is what?

MR. ERION: Is unique. Something like this has not been filed previously in a criminal case. And all I can state to the Court about the timing is that I had a very difficult time filing what I thought to be a good faith motion showing continuing NSA activity of the type covered in the Senate Report in the time period covered by this indictment. That in and of itself, however, Your

Honor, is not the question. The question, as I view it, is whether or not the motion is sufficient.

Mr. Adams further said that this thing is speculation, that it doesn't specify dates and places and phone numbers, and that the affidavit is insufficient of Mr. Nabors, insufficient to allow the agency to make a check. I gather what he's talking about is the mechanics of the check. And my reply to that, Your Honor, is that that is something that we'd have to find out from the National Security Agency, how they have this categorized, whether they have it by phone number or by dates or by subject matter of conversations, whether they have it by names. It would be up to them and their computers to tell us based on the affidavits. The question is whether or not there's enough information in that affidavit to allow the [13] check. The question is whether or not the check should be made. If it should be, the National Security Agency says "we don't have enough information," if Mr. Adams wants to come back to us, we'll see if we can find the necessary information. I don't know what we need. But the big issue is, is the affidavit sufficient to require the Court to order the National Security Agency to make a check. If the agency then comes back and says that's an impossibility, we'll try to find the information. I don't know if we can or not.

But I suspect, based on the description of the Senate Report of the watch lists, that they don't need phone numbers. They can go with names; they can go with subject matter of conversations.

Mr. Adams further has pointed out that the affidavit doesn't say that all the calls were monitored by the National Security Agency. Your Honor, the problem we have there is twofold. In the first place, we don't know exactly what the National Security Agency does, other than as described in the Senate Report. And what the Senate Report describes, in essence, is that based on the technology in 1976—and in six years, I think technology

has progressed even further—that the National Security Agency monitored all telephone calls on a particular, what they call communication link; and that the specific [14] language used here—if I can find it—is it says the initial interception of a stream of communication is analogous to a vacuum cleaner. NSA picks up all communications carried over a specific link that it is monitoring. The combination of this technology and the use of words to select communication of interest results in NSA reviewing the international messages of American citizens and groups and organizations for foreign intelligence.

Now, Your Honor, what they do, when they have a particular—what they call a link, like a telephone trunk line apparently, which now is transmitted very often—as Your Honor is aware—by microwaves internationally, microwave type communications. They pick those up; they just take in everything. If I went to Germany and wanted to call my wife and discuss family business, they get it. We don't know which links they've got because they aren't advertising that. The best we can do is say we know that they've done it in the past. And we know that they have done this sort of thing in the past. We know that they have intercepted phone calls to Latin America and Central America, South America in the past. We know that the Senate Report covers 1976, which I know from Mr. Adams is the specific time frame he intends to introduce evidence about.

Based on everything, I don't see how we can be any more [15] specific. And I would point out that the Evans case, the District of Columbia Circuit case, and the Fifth Circuit case of Tucker, somewhat addresses this problem. And it states—I'll skip some parts. But the relevant portion says the issue might arise more rarely if we required a witness—they're discussing Grand Jury witnesses, Your Honor—to allege in great specificity exactly what facts underly this belief that electronic surveillance

took place. The short answer to that suggestion is that it contradicts unambiguous procedures defined by Congress to resolve this case. The rationale behind this procedure is apparent and persuasive. By my hypothesis, electronic surveillance is functioning properly when its object has no idea that its communications are being intercepted. If we hold that a witness can make a claim only when he has found the electronic bugger, heard mysterious bleeps on the telephone or write for the files of the Department of Justice, we would merely succeed in encouraging the government to improve its security, as well as its technology.

Goes on to say where a witness alleges that private conversations have been intercepted, it would be a harsh rule that predicated his right to suppress the conversation on his disclosure of the name of the other party, much less the subject of their conversation. It is hard to see how a [16] witness could, in many cases, be more specific about alleged wiretapping.

Your Honor, we think we've met the burden in this case. We think we're entitled to the search. We think we're entitled to the very specific reply of the government. If they say they cannot make that reply based on the information we have, we will try to get other information. I don't know whether we can, but we'll try. That's the objective.

I frankly, to be honest about this, Your Honor—I don't know what the National Security Agency is going to say when Mr. Adams goes to them, because they've been real reluctant in the past to reveal anything about their procedures. And Mr. Adams says every drug smuggler could do this. My only reply to that, Your Honor, is the Congress provided for it, the Constitution provides for it, as interpreted by Congress Reports. And if Congress had wanted to prevent this sort of thing being done, they could have done that. They reviewed this agency's activities in '76. They passed the Foreign Intelligence Surveillance Act in 1978. They could've treated National Security Agency information just as they have the

Treasury Department's registration of automatic weapons and sawed-off shotguns and gambling tax information and limited its dissemination. Congress chose not to do that. They left the hole there. And if they chose to do that in the interest of national [17] security and leave the hole there, there's nothing that I can do about it or Mr. Adams or the Court. We might all wish it was different, but it's not.

That, I think, completes what I have to say on that, Your Honor.

THE COURT: All right. I want to get something back in my mind like I remember it and see if there's any difference of opinion or difference of recollection about it.

This case—the defendant appeared here in February 17, I believe it was, with counsel and entered his plea of not guilty. And at that time a large number of motions were filed by his counsel, motions for discovery of this and that, motion to bill of particulars, the usual run of motions and maybe some that are not the usual run. I don't know. And this being an American Division case, there was some discussion about whether the counsel wanted the case tried in Americus or whether they just as soon have it tried in Columbus. And that necessarily brought up the question about time for trial. And when I left the bench, counsel had indicated to the Court that they wanted to discuss it with their client, as I recall it, and to see if their client had any preference about in which division he was to be tried. And after I left the bench and had gone to my chambers, counsel for the defendant and counsel for the government came and talked to [18] me about it. And counsel for defendant stated that he'd prefer the case to be tried in Columbus Division, or was agreeable to it. I don't remember whether he said preferred. But anyway, it was all agreed.

And so that put us in a position to do some definite scheduling. And at that time it was agreed between the Court and counsel that the case would be given a special

setting for June 7, 1982 here in Columbus. And at that time I stated that, since we were getting a special setting for that time, everybody would have that in mind, that I wanted to be informed without undue delay about whether it was going to be necessary for the Court to have a hearing on any of these motions that had been filed, because I didn't want pending motions to result in delay of the trial. And it was understood that that would be done. And I had suggested that if any additional motions would be filed, that they be filed promptly so that all of them could be heard well in advance of the date of trial. That's my recollection of the general conversation that we had.

Now, here we are with the case scheduled—your having been given a special setting, scheduled for trial, for June 7—here we are on May 28 talking about this motion that was just filed—well, it indicates it was filed on May 25, earlier this week. And, obviously, if the Court should grant this motion, it would automatically mean [19] this case would have to be put off—I don't know how long; obviously a considerable time, because if there's anything like the monitoring that Mr. Erion suggests, it would require somebody to spend a lot of time trying to find out if this man has been monitored.

What I'm getting at is if a motion of this kind was going to be filed, I think it should've been filed sometime ago. If it wasn't filed at the same time all the other motions were filed, it should've been filed within a reasonable time thereafter. So I'm going to deny the motion on two grounds. One is that I don't think the showing made by the defendant is adequate to require the grant of the motion. And the other ground is that I think the motion simply comes too late, as a practical matter. If he could file it in the last week in May, when he's suppose to go to trial on June 7, and delay the thing for a couple of months, no way we could ever get a case to trial with any assurance, if motions like this could be filed that would require weeks of research and all that, on the eve of a trial. In other words, this is different from

just some routine motion that might be filed a few days before trial, demanding that the government produce some document that's in the government's file or that the government—well, just routine motions. This is something obviously that would require a lot of time for search and [20] would necessarily result in delay. I'm not suggesting now that Mr. Erion has deliberately done that—move over one way or the other, so I can see Mr. Erion. I'm not suggesting that Mr. Erion has deliberately done that, that he's held it back deliberately. I'm not suggesting that. But I'm suggesting that is the effect. In other words, I just don't think the motion comes in sufficient time before the definite setting of the case for trial, and neither do I think that the showing is adequate. So I deny the motion.

All right. What else do we have?

MR. ERION: Your Honor, I would like to point out one thing for the record based on your suggestion of untimeliness. We have no objection to proceeding to trial and still requiring the check. If they turn something up, it could be addressed after trial.

THE COURT: I didn't get the last.

MR. ERION: We would have no objection to proceeding to trial, and we're not trying to get a delay. Proceed to trial and have the check done; if it turns something up, we can take it up at that point in time afterward. But if Your Honor thinks it's insufficient, Your Honor thinks it's insufficient. I just want to indicate that I think there is a way around the lack of timeliness.

THE COURT: Well, if Mr. Adams wants to have somebody make a [21] search and see what it turns up after the trial is over and so on, of course, that's his business.

MR. ERION: I don't think he's going to have anybody do anything unless Your Honor orders him to.

THE COURT: In these circumstances, I'm not going to order it.

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**Motion to Compel the Government to Affirm or Deny the Existence of Electronic or Other Wiretap Interceptions and to Suppress the Fruits Thereof**
**May 24, 1982**

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

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Criminal No. 81-5-AMER

UNITED STATES OF AMERICA

v.

DEWEY T. NABORS, JR.

---

MOTION TO COMPEL THE GOVERNMENT TO AFFIRM OR DENY THE EXISTENCE OF ELECTRONIC OR OTHER WIRETAP INTERCEPTIONS AND TO SUPPRESS THE FRUITS THEREOF

Pursuant to 18 U.S.C. § 3504 and the attached Affidavits of Defendant Nabors and his undersigned counsel, Defendant makes the above-captioned motion to have the Government affirm or deny whether interceptions of the type described occurred and for the Court to suppress the fruits thereof, if any, and for cause shows the following:

1.

Defendant Nabors has described, under oath, a number of international telecommunications between himself and persons located in Central and South America in

which matters related to the trial of this case were discussed.

2.

As the attached Affidavit of counsel reveals, the Government by and through its National Security Agency, routinely intercepts international telephone traffic, incidentally monitoring U.S. citizens, the results of which interceptions have in the past been disseminated to United States law enforcement agencies. The National Security Agency maintains records of such intercepted products.

3.

Pursuant to 18 U.S.C. § 3504, the Government must now affirm or deny whether such interceptions occurred and, if such interceptions occurred, produce the fruits thereof for this Court.

4.

Several controlling legal principles should be noted with respect to the herein motion:

a. The Government's denial must be explicit and comprehensive of the claims made. *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972).

b. The denial must be unambiguous and unequivocal: denials of electronic surveillance "to my knowledge" are insufficient. *United States v. Alter*, 482 F.2d 1016, 1027 (9th Cir. 1973); *United States v. Vielguth*, 502 F.2d 1257, 1261 (9th Cir. 1974).

c. The denial must be under oath. *Korman v. United States*, 486 F.2d 926, 931 (7th Cir. 1973).

d. Any denial must also explicitly state that the pertinent agency which claimedly conducted the surveillance has done a comprehensive check of its records. See, *In Re Quinn*, 525 F.2d 222, 225, 226 (1st Cir. 1975). An assertion by the Government attorney is insufficient. See, *In Re Tierney*, 465 F.2d 806 (5th Cir. 1972).

WHEREFORE, Defendant prays that the Court enter an Order requiring that the Government makes inquiry of the National Security Agency and any law enforcement agencies to which it disseminates information as to whether or not interceptions of the telephone communications of this Defendant occurred, and, if any such interceptions did occur, that the Court make inquiry as to the fruits thereof and suppress said conversations and any such fruits.

Respectfully submitted, this 24th day of May, 1982.

/s/ Charles T. Erion
CHARLES T. ERION
Attorney for Defendant

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**Affidavit of Charles T. Erion, Counsel for Defendant Dewey T. Nabors, Jr., in Support of Motion to Compel May 24, 1982**

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
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---

Criminal No. 81-5-AMER

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## AFFIDAVIT OF CHARLES T. ERION

I am of counsel for defendant Dewey T. Nabors, Jr. in the captioned case:

1.

I have reviewed portions of the following U.S. Government publication: Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, 94th Congress, 2nd Sess., Report No. 94-755 (1976), especially that portion entitled "National Security Agency Surveillance Affecting Americans", pp. 733-783.

That portion discloses as follows:

a. The National Security Agency (NSA) is authorized to systematically conduct covert electronic surveil-

lance of telephone communications between the United States and foreign countries (pp. 736-737).

b. This intercept activity includes the surreptitous monitoring of telephone conversations between the United States and foreign countries and ". . . selection criteria are used which result in NSA's reviewing many communications to, from, or about an American. NSA picks up all communications carried over a specific link that it is monitoring. The combination of this technology and the use of words to select communications of interest results in NSA analysts reviewing the international messages of American citizens . . ." (p. 741)

c. NSA has in the past so intercepted such communications with South American countries and made dissemination to law enforcement agencies, including the Bureau of Narcotics and Dangerous Drugs (predecessor to the Drug Enforcement Administration).

d. Until being purged, records are maintained of this intercept material, but without serialization or number, and without record in other places within the agency's permanent files. (p. 748)

2.

I have also reviewed a document known as *Affidavit of Eugene F. Yeates*, who is the Chief, Office of Policy of the National Security Agency, and a document known as *Affidavit and Claim of Privilege of the Secretary of Defense*, signed by Harold Brown, Secretary of Defense. These documents were subscribed by the affiants in June and July, respectively, of 1980, and were filed in the United States District Court of the District of Columbia in the case of *Harrison E. Salisbury v. United States of America, National Security Agency, and Harold Brown*, Civil Action no. 80-0900, U.S.D.C., Dist. Col. These documents disclose the following:

a. NSA continues to intercept international electronic communications which either originate or terminate in

the United States, including communications utilizing the facilities of international communications common carriers passed in part by wire (i.e. telephone communications).

b. The information obtained from these interceptions is reported "to various agencies of the Government in response to their approved requirements for foreign intelligence." (Brown) In this regard it is to be noted that the above mentioned Senate Report indicates that NSA has, on occasion in the past, felt that the international aspect of drug trafficking was "sufficient justification for classifying the activity as part of its 'foreign intelligence' mission." While such interpretation by NSA terminated in the mid 1970's, the procedure of the agency is subject to change by internal NSA directives. (Senate Report, pp. 742, 755-756) See also: H.R. Rep. 1283, Part. I, 95th Cong., 2nd Sess., 50-51 (1978).

c. ". . . it necessarily occurs that some circuits, which have either a foreign origin or terminus or both and which are known to carry foreign communications necessary for foreign intelligence, will also carry personal communications of US persons." While the Government purportedly attempts to minimize the interception of unwanted messages, ". . . many unwanted messages are potentially available for selection." Once NSA decides to monitor the traffic on a particular circuit, it appears that all such traffic is monitored and ". . . there is no way to avoid interception of some private communications carried over monitored links." (Brown)

3.

On Friday, May 14, 1982, Assistant United States Attorney William P. Adams, who affiant understands is of counsel for the Government in the above-referenced criminal case, informed affiant that the Government had information related to the Defendant Nabors (which information it might introduce into evidence in the trial

of this case) regarding alleged drug smuggling activities of the defendant for "the past six years," thereby indicating to affiant that the Government had been assimilating information on this Defendant which would include the time frame covered not only by the present indictment and the affidavits of Messrs. Brown and Yeates, but also the specific time frame encompassed within the above-mentioned Senate Report.

Dated: This 24th day of May, 1982.

/s/ Charles T. Erion
CHARLES T. ERION
Attorney for Defendant

Sworn to and subscribed before me this 24th day of May, 1982.

/s/ Kathy C. Harkins
Notary Public
Notary Public, Bibb Co., Ga.
My commission expires May 11, 1985

**Affidavit of Dewey T. Nabors, Jr., Defendant in Support of Motion to Compel May 24, 1982**

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

---

Criminal No. 81-5-AMER

UNITED STATES OF AMERICA

v.

DEWEY T. NABORS, JR.

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## AFFIDAVIT OF DEWEY T. NABORS, JR.

I, DEWEY T. NABORS, JR., state and declare:

That I am the defendant in the above-entitled action;

That I make this declaration on my own behalf, in support of my motion to compel the Government to affirm or deny the existence of electronic or other wiretap information which it intercepted, involving telephone conversations between myself and persons located within Central and South America;

That between and including the years 1976 and 1980 I have been a party to numerous telephone calls from the United States of America to persons speaking from telephones located within the nations of Colombia, Venezuela, and Panama;

That certain of those telephone calls related to the activities which are the subject matter of the indictment

against me in the present case and to other similar prior activities;

That I am informed and believe, and thereupon allege, that it is the policy of the United States of America to monitor a considerable portion—if not all—of the telephone traffic between the United States and foreign countries;

That based thereon, I am informed and believe, and thereon allege, that some or all of my aforementioned telephone conversations with persons located in Central and South America, were, in all likelihood, intercepted by the United States of America;

That I therefore request that this Court enter an Order compelling the United States of America to affirm or deny that it has intercepted any such telephone conversations to which I was a party; in the event any such conversations have been intercepted that this Court make appropriate inquiry determining whether any evidence which the Government intends to introduce in the prosecution of this case was a fruit of any such interception and, if so, that this Court enter an Order suppressing any such conversations and the fruit thereof as evidence.

I declare under penalty of perjury that the foregoing is true and correct, except as to those matters stated on information and belief, and as to those matters I believe them to be true.

Dated: This 24th day of May, 1982.

/s/ Dewey T. Nabors, Jr.
DEWEY T. NABORS, JR.

Sworn to and subscribed before me this 24th day of May, 1982.

/s/ Kathy C. Harkins
Notary Public
Notary Public, Bibb Co., Ga.
My commission expires May 11, 1985

**Excerpts of Trial, June 7, 1982, relating to the District Court's Ruling Admitting the Prior Acts Testimony of Michael David Warner**

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

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Criminal No. 81-5-AMER

UNITED STATES OF AMERICA

vs.

DEWEY T. NABORS, JR.

---

PRESIDING: HONORABLE J. ROBERT ELLIOTT, JUDGE

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APPEARANCES

For the Government:

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For the Defendant:

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Summerville, Georgia 30747

Mr. Charles T. Erion
Attorney at Law
163 College Street
Macon, Georgia 31201

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[42] (BRIEF RECESS)

(JURY OUT)

THE COURT: You stated you had something you wanted to take up before the jury was brought back.

MR. COOK: Yes, Your Honor. We have been advised by Mr. Adams, counsel for the government, that he intends to offer evidence of prior acts or other crimes under the purview of Rule 404-B. He has told us what that is. We, frankly, seriously question the admissibility of other crimes evidenced within the context of the factual setting of this case. We would kindly ask that some ruling be made [43] outside of the hearing and the presence of the jury on the other crimes evidence and that a proffer be made, briefly if possible, where the Court and counsel for the defendant can interpose an appropriate objection.

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[47] MR. ADAMS: • • • On the similar acts evidence, briefly, Your Honor, what we propose to show is that Mike Warner met Dewey Nabors in 1975 through their common interest in the aviation business. They flew together, so forth, and ultimately the subject of flying a load of marijuana came up in late '75. And Mr. Warner went to the Bahamas, in fact, at Mr. Nabors' request, to look for a place to keep fuel there, a stopping over point to bring in marijuana. That thereafter Mr. Warner flew a load of marijuana into Smithville, Georgia on January 13, 1976; that prior to that trip he had had conversations with Mr. Nabors about the landing strip that was to be used to bring in that load of marijuana. And we have a tape recording of a telephone conversation between Mr. Nabors and Mr. Warner, where they talk about the strip that they will look at to bring this load in. And, in fact, the load did come in on January 13, 1976.

Thereafter, Mr. Nabors acquired an airplane through a corporation formed for him by Mr. Roger Land. This

airplane was an A-26 bomber. He acquired it in February of 1976. He gets the airplane and gets Mike Warner to be his [48] pilot, exactly what we have here. And Mr. Warner, in fact, agreed to fly for him and flew a load that was brought in from Colombia, South America to Sylvester, Georgia. The plane was then moved over to Cordele, Georgia, where it was seized by authorities with some marijuana residue.

So we expect the evidence to show that then Mr. Warner flew another load of marijuana in May, where he got caught and was convicted in Federal Court and went off to prison. And that thereafter he gets out in about November or December, 1979, and shortly thereafter he hears from Dewey Nabors, who's in the process of getting an airplane and needs a pilot. Warner, an old smuggling buddy who's out of jail, needs some money, and then they make a deal that lead to this case.

Now, under the law, a recent Fifth Circuit case says that a mere not guilty plea to a conspiracy count renders the defendant's intent a material issue. That's the Roberts case, an issue that had been reserved for a period of time. But they now say just a mere not guilty plea is all I need to argue to the Court that intent is an issue. And if intent is an issue, then we go to 404-B. I'm not offering this evidence to show Mr. Nabors is a bad guy. I'm offering it to show the points under 404-B—intent, plan, preparation, absence of mistake or accident, several others under that 404-B.

[49] And under the Beacham [sic] case, which is the in bank [sic] opinion, the law in the Fifth Circuit, a two-pronged test. One is relevance, and intent is an issue. So we submit the prior acts are relevant, and its probative value is not outweighed by undue prejudice. There's some need by the government to offer this, which we submit without this evidence—we submit there is a need for the government's case to have this.

The only point I can see that presents a problem perhaps is remoteness in time. There's four years differ-

ence. But I found one case where three years was not considered a problem. And I found another case in the Second Circuit, Your Honor, which is right on point. It's not just a matter of 404-B evidence. What we've got is a pilot who flew this load was the same pilot involved with him before. And that testimony of his prior contact and dealings with this defendant is offered to show the basis of the conspiracy that's in this indictment, the activity here. And there's a Second Circuit case, Magnana*, 543, 431, where the guy dealt with the folks, went off to prison; seven years later he gets out of prison, gets back with the same folks, ends up testifying against them. And the Second Circuit said it was okay for him to testify about his activity seven years earlier with those same folks to show background of conspiracy.

[50] So with that and the substantial similarity, which is the key point, we contend that this evidence is very admissible under 404-B, and we propose to offer it subject to the Court's ruling.

THE COURT: I don't have any problem with that myself. I would intend to admit that type of evidence. I dealt with this same question recently, it just happens, in another Americus Division case. And the research I've done on it makes that type of evidence clearly admissible.

MR. COOK: We would clearly ask that—at this point in time, since Your Honor has ruled that prior acts is admissible—that limiting instructions be given at the time that it is received.

THE COURT: Yes. In other words, the fact that a defendant may have done something at one time is not proof he did it this time.

MR. COOK: That is exactly right.

THE COURT: I understand.

MR. COOK: Moreover, with reference to—

THE COURT: Now, if I forget to do that, you remind me of it. I intend to remember to do it.

MR. COOK: Yes, sir.

• • • •

**Excerpts of Transcript of Trial, June 7, 1982, relating to the District Court's Ruling Admitting Evidence of Defendant's Pre-Arrest Silence**

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

---

Criminal No. 81-5-AMER

UNITED STATES OF AMERICA

vs.

DEWEY T. NABORS, JR.

---

PRESIDING: HONORABLE J. ROBERT ELLIOTT, JUDGE

---

APPEARANCES

For the Government:

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* * * *

[175] (BRIEF RECESS)

(JURY OUT)

THE COURT: All right. Now, it was understood that you would get into the record what you wanted to get into the record about that testimony about the insurance. You can do that now.

MR. COOK: Thank you, Your Honor.

Mr. Adams was kind enough to alert us to the proposition that he was about to offer certain evidence from the government witness Marshall Dean and Peggy Drane. At that time we approached the bench, and it was agreed that the witnesses could go ahead and testify. The Court indicated that you were going to overrule the objection, giving us the express permission to insert our total objection into the record at this time, in order that we might not get into a waiver situation. And we would proceed to do that promptly.

[176] We strenuously object to the testimony of Marshall Dean and Peggy Drane, as well as Government Exhibit 7-A and Exhibit—well, 7-A is a collective exhibits—and 7-B for the reason that the defendant in this case has not taken the stand and has not offered any explanation or alibi. He has not said anything in this case thus far. And for the government to be allowed to show that a letter was written by an insurance company with reference to the loss on this airplane, calling upon him to file a proof of loss and to make a sworn statement in connection with the loss, when this airplane was allegedly hauling marijuana and other contraband, is tantamount to permitting the government to show since he did not file a proof of loss, since he did not file a claim, and since he did not come forward and cooperate within the meaning of the policy, the government seeks to draw an inference from that—and certainty will argue—that it constitutes an indicia of guilt in this case.

We say that [this] is in violation of the Self-Incrimination Clause, as well as the Fundamental Fairness Rule, as expressed in the Due Process Clause of the Fifth Amendment.

There is a recent case, a Supreme Court case, which says—and the name of it escapes me at the moment; I could find it very quickly. In which the court makes a [177] distinction between pre-arrest silence and post-arrest silence. But the distinction which is made is made within the context there. The defendant, as I recall, actually took the stand and testified to something, made an explanation of something which he had failed to make an explanation of in a pre-arrest situation. But we think that this evidence, within the manner in which it was introduced, and the posture of the trial being such as it is, and the defendant not having testified—nor will the defendant testify in this case—that it is highly improper; that it is prejudicial; and that it is tantamount to depriving this defendant of a fair trial.

THE COURT: All right. Well, as I previously indicated, it was my thought that it was admissible. So that's my ruling.

* * * *

**Indictment of Grand Jury in the United States District Court for the Middle District of Georgia**
**December 2, 1981**

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

---

Criminal No. 81-5-AMER

UNITED STATES OF AMERICA

v.

DEWEY T. NABORS, JR.

---

THE GRAND JURY CHARGES:

COUNT ONE

That from on or about the 1st day of January, 1980, to on or about the 13th day of April, 1980, in the Americus Division of the Middle District of Georgia, and elsewhere, DEWEY T. NABORS, JR., did wilfully and knowingly combine, conspire, confederate, and agree with others to knowingly and intentionally import marijuana, a Schedule I non-narcotic controlled substance, and methaqualone, a Schedule II controlled substance, into the customs territory of the United States from Columbia [sic], South America, a place outside such territory; all in violation of Title 21, United States Code, Section 963 i/c/w Title 21, United States Code, Sections 952 and 960.

COUNT TWO

That from on or about the 1st day of January, 1980, to on or about the 13th day of April, 1980, in the Americus Division of the Middle District of Georgia, and elsewhere,

DEWEY T. NABORS, JR., did wilfully and knowingly combine, conspire, confederate, and agree with others to knowingly and intentionally possess with intent to distribute marijuana, a Schedule I non-narcotic controlled substance, and methaqualone, a Schedule II controlled substance; all in violation of Title 21, United States Code, Section 846 i/c/w Title 21, United States Code, Section 841(a)(1).

COUNT THREE

That on or about the 13th day of April, 1980, in the Americus Division of the Middle District of Georgia, DEWEY T. NABORS, JR., knowingly and intentionally did import at least twenty-three pounds of marijuana, a Schedule I non-narcotic controlled substance, into the customs territory of the United States from Columbia [sic], South America, a place outside such territory; in violation of Title 21, United States Code, Section 952(a), and Title 18, United States Code, Section 2.

COUNT FOUR

That on or about the 13th day of April, 1980, in the Americus Division of the Middle District of Georgia, DEWEY T. NABORS, JR., knowingly and intentionally did import at least twenty pounds of methaqualone, a Schedule II controlled substance, into the customs territory of the United States from Columbia [sic], South America, a place outside such territory; in violation of Title 21, United States Code, Section 952(a), and Title 18, United States Code, Section 2.

COUNT FIVE

That on or about the 13th day of April, 1980, in the Americus Division of the Middle District of Georgia, DEWEY T. NABORS, JR., knowingly and intentionally did possess with intent to distribute at least twenty-three pounds of marijuana, a Schedule I non-narcotic controlled substance; in violation of Title 21, United States Code,

Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT SIX

That on or about the 13th day of April, 1980, in the Americus Division of the Middle District of Georgia, DEWEY T. NABORS, JR., knowingly and intentionally did possess with intent to distribute at least twenty pounds of methaqualone, a Schedule II controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

A TRUE BILL.

/s/ P. Balfour Hunnicutt
Foreman of the Grand Jury

/s/ William P. Adams
Assistant United States Attorney

Office - Supreme Court, U.S.
FILED
JAN 11 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-552

# In the Supreme Court of the United States

OCTOBER TERM, 1983

DEWEY T. NABORS, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the district court erred in admitting evidence of petitioner's silence in response to a private insurer's inquiry.

2. Whether the district court abused its discretion in admitting similar crimes evidence.

3. Whether the district court erred in ruling that petitioner had not made a claim sufficient to require the government to affirm or deny use of illegal electronic surveillance.

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# In the Supreme Court of the United States

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DEWEY T. NABORS, JR., PETITIONER

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---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 707 F.2d 1294.

### JURISDICTION

The judgment of the court of appeals was entered on June 23, 1983. A petition for rehearing was denied on August 15, 1983 (Pet. App. A17-A18). The petition for a writ of certiorari was filed on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of conspiracy to import marijuana and methaqualone (Count I); conspiracy to possess marijuana and methaqualone with intent to distribute (Count II); importing marijuana (Count III); importing methaqualone (Count IV);

possession of marijuana with intent to distribute (Count V); and possession of methaqualone with intent to distribute (Count VI), in violation of 21 U.S.C. 841, 846, 952, 960, and 963 (Pet. 4). Petitioner was sentenced to 15 years' imprisonment to be followed by a five-year special parole term (R. 87). The court of appeals affirmed (Pet. App. A1-A16).

1. The evidence at trial showed that in February 1980, petitioner arranged to lease an airplane from Associated Auto Leasing, Inc., for use in a drug smuggling operation. Petitioner obtained an insurance policy on the airplane that showed him as an insured and lessee of the plane (Tr. 152; GX 2). Petitioner also contacted Mike Warner and arranged to have him fly the plane from South America to Georgia with a 900 pound load of marijuana in exchange for $50,000 (Tr. 278-280). In 1976, Warner had twice flown marijuana from South America to Georgia for petitioner (Tr. 247-248, 262-265).

On Saturday, April 12, 1980, petitioner met Warner in Colombia, South America, and assisted him in loading marijuana and methaqualone onto the airplane (Tr. 289-292). Warner flew the drugs to Georgia on April 13, but weather problems prevented him from landing on the designated strip (Tr. 293-294). Instead, Warner landed near Unadilla, Georgia, where he set the airplane on fire (Tr. 294-295; GX 10A-10L). Dooly County, Georgia officials discovered the airplane and its cargo, and arrested Warner (Tr. 52-59, 94-96). Warner implicated petitioner and was the government's main witness at trial.

Following destruction of the airplane, the insurance company, pursuant to its policy with petitioner, sent him a letter requesting his cooperation in the company's investigation (GX 7A). Although he received this letter (Tr. 170-175), petitioner never responded to it. In fact, petitioner made no attempt to contact the insurance company after the loss of the airplane (Tr. 166-167).

2. Two weeks before trial petitioner moved under 18 U.S.C. 3504 to compel the government to affirm or deny the existence of electronic interceptions of petitioner's international phone conversations (Pet. App. A34-A36). Petitioner's motion was supported by an affidavit from his attorney stating that government documents revealed a policy of the National Security Agency (NSA) to monitor international telephone conversations, and by his own affidavit, which said, " '[B]ased on NSA's policy of surveillance, I am informed and believe, and thereon allege, that some or all of my aforementioned telephone conversations with persons located in Central and South America, were, in all likelihood, intercepted by the United States of America' " (Pet. App. A15-A16). The district court denied petitioner's motion (Pet. App. A33).

## ARGUMENT

1. Petitioner contends (Pet. 10-18) that it was error to admit in the government's case-in-chief evidence of petitioner's failure to respond to the insurance company inquiry, despite petitioner's representation that he would not testify. The district court properly admitted this evidence.

The voluntary decision to speak or remain silent in the absence of any official compulsion does not implicate the Fifth Amendment. See, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 240 (1980). Petitioner's silence came in response to a private insurer's inquiry, not to governmental interrogation. The insurer's inquiry occurred one and a half years before petitioner's indictment. Had petitioner made statements to his insurance company at that time, the prosecution undoubtedly could have introduced them free of any conceivable Fifth Amendment claim of compelled self-incrimination. Just as the prosecution could have introduced petitioner's statements as not compelled by state action, it permissibly introduced evidence of his silence. Cf.

*United States* v. *Giese*, 597 F.2d 1170, 1196 (9th Cir.), cert. denied, 444 U.S. 979 (1979) (admission of defendant's pre-arrest failure to deny co-conspirator's lawyer's statement that he knew defendant was a participant in crime); *United States* v. *King*, 560 F.2d 122, 134-135 (2d Cir.), cert. denied, 434 U.S. 925 (1977) (evidence that defendant remained silent in response to corporate official's criticism); *United States* v. *Kilbourne*, 559 F.2d 1263, 1265 (4th Cir.), cert. denied, 434 U.S. 873 (1977) (testimony concerning defendant's silence when witness asked how he knew about victim's death before body was found and before police released news of murder); *United States* v. *Hoosier*, 542 F.2d 687 (6th Cir. 1976) (evidence of defendant's silence when his girl friend told a third party about proceeds from bank robbery).

Petitioner makes no suggestion that the government was somehow responsible for the insurance company's inquiry, or that "the government had induced [his] silence" in any way. *Fletcher* v. *Weir*, 455 U.S. 603, 606 (1982). This case is thus clearly distinct from all those on which he relies for his Fifth Amendment claim. *Doyle* v. *Ohio*, 426 U.S. 610 (1976) (impeachment by post-arrest silence immediately following *Miranda* warnings not permitted); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (failure to testify before grand jury); *Marchetti* v. *United States*, 390 U.S. 39 (1968) (failure to register and pay wagering tax); *Grosso* v. *United States*, 390 U.S. 62 (1968) (failure to pay wagering tax); *Rogers* v. *United States*, 340 U.S. 367 (1951) (failure to testify before grand jury); *United States* v. *Caro*, 637 F.2d 869 (2d Cir. 1981) (defendant's silence during Customs inspector's examination of his suitcase); *United States* v. *Sprengel*, 103 F.2d 876 (3d Cir. 1939) (defendant's failure to answer questionnaire sent by postal inspector).[1]

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[1]For the same reason, this case does not present the question, left open in *Jenkins* v. *Anderson*, 447 U.S. at 236 n.2, "whether or under

2. Petitioner contends (Pet. 18-23) that because he did not contest the issue of intent, the trial court erred when it admitted evidence of prior similar acts under the "intent" exception to Fed. R. Evid. 404(b). The court of appeals properly rejected this contention.

Petitioner's counsel in fact urged in his closing argument that petitioner lacked the requisite intent to justify conviction (Pet. App. A13). He also attempted to show through cross-examination that petitioner had not acted in a furtive manner indicative of criminal conduct. Petitioner concedes (Pet. 19 n.15) that this line of cross-examination was intended to contradict the government's evidence that he had *participated* in the conspiracy. There was, however, no dispute that petitioner in fact leased the aircraft and undertook associated responsibilities, and permitted Warner to fly the plane. Thus, petitioner's contention that he did not participate in the conspiracy is in effect a claim that while he undertook certain acts linking him to the other conspirators, he did not share their criminal intent. Contrast *United States* v. *Powell*, 587 F.2d 443 (9th Cir. 1978) (defendant charged with conspiracy to possess marijuana with intent to distribute contended that he did not supply the marijuana possessed by co-conspirators). Since, as the court of appeals found (Pet. App. A13), the prior crimes evidence was probative of petitioner's intent, and was not unfairly prejudicial, the trial judge did not abuse his discretion in admitting it into evidence.

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what circumstances prearrest silence may be protected by the Fifth Amendment." In *Jenkins* the issue was whether the government could introduce evidence that the defendant had failed to report a stabbing to the police. Here the evidence in question simply concerned petitioner's unexplained decision to forfeit coverage on his insurance policy (see GX 7A).

In *United States* v. *Roberts*, 619 F.2d 379, 383 (1980), the Fifth Circuit held that in a conspiracy case where the defendant pleads not guilty, prior crimes evidence is admissible in the government's case-in-chief unless the defendant affirmatively removes the issue of intent. Insisting that the court of appeals relied only upon *Roberts* to rule the prior crimes evidence here admissible, petitioner points to a purported conflict between *Roberts* and cases in other circuits (Pet. 20-22). But as we noted above, the evidence here was admissible quite apart from the holding in *Roberts*, since petitioner's intent was in fact a contested issue. In any event, the cases petitioner relies upon are quite different from *Roberts* and from the instant case. In conspiracy cases, such as *Roberts*, the element of intent is often difficult to prove (619 F.2d at 383). The cases cited by petitioner, by contrast, involved substantive offenses, the requisite intent for which could be inferred from the nature of the act or from other evidence presented at trial. See *United States* v. *Ring*, 513 F.2d 1001, 1008 (6th Cir. 1975) (in prosecution for mailing threatening letters, if act were proven, intent would naturally be inferred); *United States* v. *Fearns*, 501 F.2d 486, 491 (7th Cir. 1974) (in prosecution for forgery, "[i]t is hardly conceivable that, if those acts were done, they were done with innocent intent"); *United States* v. *Fierson*, 419 F.2d 1020, 1023 (7th Cir. 1969) (in prosecution for impersonating an FBI agent, the "facts * * * did not raise even the slightest suggestion that Fierson did the physical act charged but without the requisite willfulness and intent").

Petitioner claims (Pet. 22-23) that in any event the rule in *Roberts* presents the defendant with an unconstitutional choice: either stipulate to the issue of intent, or suffer the introduction of clearly prejudicial evidence without regard to the government's need for such evidence. But the fact that the court of appeals has permitted a criminal defendant an

opportunity to avoid introduction of probative, inculpatory, and otherwise admissible evidence if he elects to stipulate cannot possibly violate the defendant's rights, and of course extrinsic offense evidence may be admitted only if its probative value is not substantially outweighed by its undue prejudice. Fed. R. Evid. 403; *United States* v. *Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). In this case the court of appeals properly concluded (Pet. App. A13-A14) that it was not.

3. 18 U.S.C. 3504 provides that upon a defendant's claim that evidence is inadmissible because it is the fruit of unlawful electronic surveillance, the government shall affirm or deny the alleged unlawful act. Petitioner argues (Pet. 23-28) that the district court and the court of appeals erred in ruling that his allegations were insufficient to require the government to affirm or deny the use of illegal electronic surveillance to obtain evidence in this case. This claim is without merit.

If allusion to the statistical possibility that the government monitored some of petitioner's international telephone conversations sufficed to constitute a "claim" under Section 3504, any defendant who makes international calls prior to trial could delay criminal proceedings pending discovery of information responsive to his claim. Section 3504 "was not intended, however, to transform an investigation by the government into an investigation of the government where claims of illegality lack substantial support." *In re Millow*, 529 F.2d 770, 774 (2d Cir. 1976). Consequently, the rule that a defendant's "mere assertion" of illegal electronic surveillance is sufficient to trigger the government's obligation to affirm or deny has been understood to require "at a minimum, a positive statement that unlawful surveillance has taken place." *United States* v. *Tucker*, 526 F.2d 279, 282 (5th Cir.), cert. denied, 425 U.S.

958 (1976). See also *In re Millow*, 529 F.2d at 774 (a "colorable basis"); *In re Baker*, 680 F.2d 721 (11th Cir. 1982); *United States* v. *Rubin*, 559 F.2d 975 (5th Cir. 1977), judgment vacated and remanded on other grounds, 439 U.S. 810 (1978), rev'd in part on other grounds on remand, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979).

Since petitioner's allegations expressed only a *belief* of likely interception, and since petitioner did not allege that any of the evidence against him was the fruit of unlawful interception, his suppositions clearly fell short of the minimum necessary to trigger a governmental obligation to respond to his claim.[2]

Even if petitioner's allegations were sufficient to constitute a "claim" under 18 U.S.C. 3504, the government's response was adequate to justify denial of petitioner's motion to suppress. The sufficiency of the government's denial of illegal electronic surveillance is dependent upon the specificity of the movant's allegations. See, *e.g.*, *In re Grand Jury Proceedings*, 664 F.2d 423, 427 (5th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); *United States* v. *See*, 505 F.2d 845, 856 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975). Here the Assistant United States Attorney stated that "the evidence in this case is not derived from any monitoring of any kind. I've talked to every agent involved. I've read every report I could find on [petitioner]" (Pet.

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[2]Petitioner argues that the rule in the Fifth and Eleventh Circuits, and by implication the rule in the Second Circuit, conflicts with the decisions of other courts of appeals that have not elaborated upon the "mere assertion" requirement. But those courts approved the "mere assertion" requirement only in cases where the defendant in fact made detailed allegations, see *United States* v. *Vielguth*, 502 F.2d 1257, 1258 (9th Cir. 1974); *United States* v. *Toscanino*, 500 F.2d 267, 270-271, 281 (2d Cir. 1974), or where the allegation of wiretapping was plausible on its face. See *In re Evans*, 452 F.2d 1239, 1250 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972).

App. A27). Since petitioner's allegations were conclusory and unsupported, the Assistant United States Attorney's statement was sufficient to support denial of his motion to suppress. See *United States* v. *Alvillar*, 575 F.2d 1316, 1321 (10th Cir. 1978); *In re Grand Jury Proceedings*, 643 F.2d 226, 228-229 (5th Cir. 1981).[3]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

BRENDA GRUSS
*Attorney*

JANUARY 1984

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[3]Moreover, the manner in which petitioner's drug smuggling scheme was discovered — by local officials after the plane caught fire following its unanticipated landing at Unadilla -- makes it exceedingly implausible to suppose that illegal electronic surveillance could have had any relation to the prosecution's case.

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No. 83-552

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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DEWEY T. NABORS, JR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## REPLY OF PETITIONER DEWEY T. NABORS, JR.

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## REPLY OF PETITIONER DEWEY T. NABORS, JR.

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Petitioner, Dewey T. Nabors, Jr., herein responds to the brief submitted by the Solicitor General for the United States in opposition to Petitioner's application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

### ARGUMENT

The Solicitor General's brief is a somewhat surprising response to Petitioner's application for a writ of certiorari. Rather than addressing the substantive legal issues in a straightforward manner, the Solicitor General's brief is largely devoted to conclusory assertions supported, if at all, by disingenuous manipulations of the relevant decisional authority. After setting forth arguments which

baldly assume a decision favorable to the government on the very issues presented for review, the Solicitor General then nimbly pulls himself up by his own bootstraps and concludes that there are no substantial issues for consideration by this Court.

**Admission of Evidence of Petitioner's Pre-Arrest Silence**

Typical of his misguided response to Petitioner's application for a writ of certiorari, is the Solicitor General's argument that the instant case does not present the question, left open in *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980), "whether or under what circumstances prearrest silence may be protected by the Fifth Amendent." (Solicitor General's Brief at 4 n.1). The Solicitor General attempts to justify this remarkable assertion by first summarily concluding that silence "in the absence of any official compulsion does not implicate . . . Fifth Amendment" protections against self-incrimination,[1] and then suggesting that "official compulsion" *must* take the form of "governmental interrogation" at the time of the defendant's silence. (Solicitor General's Brief at 3).

The Solicitor General's emphasis on the absence of "governmental interrogation" in this case merely begs the question left open in *Jenkins* and now presented for review. Although Justice Stevens, in his concurring opinion

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[1] The Solicitor General's citation of *Jenkins v. Anderson* in support of this proposition indicates the degree to which he has confused this Court's separate analyses of the due process and self-incrimination claims raised by the defendant in that case. Whereas the absence of governmental interrogation in *Jenkins* was relevant to the defendant's due process claim, *see* 447 U.S. at 238-40, it was not a factor in this Court's analysis of the defendant's claim under the self-incrimination clause of the Fifth Amendment. Indeed, the majority in *Jenkins* explicitly stated that, in light of *Raffel v. United States*, 271 U.S. 494 (1926), its decision did not consider whether or under what circumstances pre-arrest silence may be protected by the Fifth Amendment right to remain silent. 447 U.S. at 236 n.2. The Solicitor General's reliance on *Fletcher v. Weir*, 445 U.S. 608 (1982) is similarly misplaced.

in *Jenkins*, did suggest that an individual's right not to incriminate himself exists only when he is under "official compulsion" to speak, 47 U.S. at 242-44, this view was flatly rejected by Justices Marshall and Brennan and has never been endorsed by a majority of this Court. *See id.* at 250 n.4 (Marshall, J., dissenting). The majority in *Jenkins* simply applied this Court's prior ruling in *Raffel v. United States*, 271 U.S. 494 (1926), to hold that a defendant who elects to testify in his own behalf waives Fifth Amendment objections to the prosecution's use of his pre-arrest silence for *impeachment purposes*. 447 U.S. at 235-38. Since the defendant in *Jenkins*, *unlike the Petitioner in this case*, elected to testify at his trial, it was not necessary for the Court to decide whether "official compulsion" is necessary to trigger Fifth Amendment protections against self-incrimination and, if so, whether such compusion must take the form of "governmental interrogation" at the time of the defendant's silence.

In this regard, Petitioner respectfully submits that prosecutorial comment upon a non-testifying defendant's pre-arrest failure to provide information pertaining to the charges against him is precisely the type of retributive sanction the Fifth Amendment was designed to prohibit. That Petitioner's silence in the present case was not in response to "governmental interrogation" is not controlling inasmuch as the violation of his Fifth Amendment rights occurred not when he remained silent, but when his silence was later used against him *by the government* as part of its direct case. *See Jenkins v. Anderson*, 447 U.S. at 250 n.4 (Marshall, J., dissenting).

The Solicitor General applies a similarly "flexible" analysis in arguing that since the prosecution could have used *voluntary* statements made by Petitioner in response to the insurance company's inquiry, it should be entitled to use Petitioner's failure to respond as well. (Solicitor General's Brief at 3-4). In addition to being unsupported

by the Solicitor General's cited authority,[2] this argument appears to rest on a misstatment of the rule that *voluntary* statements following a *knowing waiver* of an accused's privilege against self-incrimination are admissible. *See Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Garrity v. State of New Jersey*, 385 U.S. 493 (1967). The Solicitor General apparently contends that since statements made by a defendant following a voluntary waiver of his Fifth Amendment privilege are admissible, the prosecution should be entitled to comment on the silence of a defendant who refuses to waive his privilege against self-incrimination. This conclusion, of course, was squarely rejected by this Court in *Griffin v. California*, 380 U.S. 609 (1976).

In this case, the Solicitor General cannot even seriously contend that Petitioner waived his privilege against self-incrimination.[3] Petitioner has consistently maintained

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[2] Each of the cases cited by the Solicitor General in support of this argument involves the admissibility, under an exception to the hearsay rule contained in Fed. R. Evid. 801(d)(2)(B), of evidence of a defendant's tacit admission of guilt (*See* Solicitor General's Brief at 4). Under Rule 801(d)(2)(B), evidence of an accused's s. ence is admissible over hearsay objections only where his silence manifests acquiescence to or adoption of a third party's accusation of guilt. *See United States v. Giese*, 597 F.2d 1170, 1195-96 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979). In the present case, Petitioner's silence was not in response to any accusation of guilt, nor did it manifest his acquiescence to or adoption of any third party statement.

[3] Nor can the Solicitor General maintain that had Petitioner responded to the insurance company's inquiry, he would have done so voluntarily. Although Petitioner might have determined that he had no choice but to respond to the insurance company if he had known that his silence would later be used against him by the government as part of its direct case, Petitioner would have been confronted with "a choice between the rock and the whirlpool," *Garrity v. State of New Jersey*, 385 U.S. at 496, and any information he might have provided would have been effectively compelled by the government.

throughout these proceedings that his decision to remain silent, commencing with his refusal to respond to the insurance company's demand for a statement under oath, and continuing through trial with his decision not to testify, was an invocation of his right to remain silent protected by the Fifth Amendment. Moreover, Petitioner asserted his privilege against self-incrimination at the earliest available opportunity by objecting to the admission of evidence of his pre-arrest silence, and announcing his intention not to take the stand, prior to the government's presentation of its direct case. Under these circumstances, Petitioner respectfully submits that the admission of evidence of his pre-arrest silence impermissibly burdened the exercise of his constitutional privilege against self-incrimination and that, upon full briefing and plenary consideration, this Court is likely to so find.

**Admission of Evidence of Petitioner's Alleged Prior Similar Acts**

No less surprising than his arguments concerning the propriety of admitting evidence of Petitioner's pre-arrest silence are the Solicitor General's contentions with respect to the admissibility of evidence of Petitioner's alleged prior similar acts. Although the Solicitor General asserts that Petitioner affirmatively placed his intent in issue, it is respectfully submitted that a review of the trial transcript shows that the issue of intent was never genuinely contested. In any event, the district court ruled upon the admissibility of "prior acts" evidence before the government had presented any evidence and without knowing the nature of Petitioner's defense. Rather than first determining whether the issue of intent would be contested and then balancing the government's need for prior acts evidence against its clearly prejudicial effect, the district court admitted evidence of Petitioner's alleged prior similar acts under the theory announced in *United States v. Roberts*, 619 F.2d 379 (5th Cir. 1980), that a defendant's mere plea of not guilty to conspiracy charges renders such evidence automatically admissible,

unless the defendant stipulates intent. As noted in Petitioner's application for a writ of certiorari, this "rule" is not only in conflict with decisional authority in at least three other circuits, but impermissibly burdens in accused's exercise of his Fifth and Sixth Amendment rights.

The Solicitor General's attempt to brush aside the conflict among the circuits on the question of whether a defendant's mere plea of not guilty will, in and of itself, justify the admission of extrinsic offense evidence is equally unpersuasive. Although the Solicitor General contends that each of the cases cited by Petitioner involved "substantive offenses," rather than conspiracy claims, he conveniently overlooks *United States v. Powell*, 587 F.2d 443 (9th Cir. 1978), a *conspiracy* case in which the Ninth Circuit held, contrary to the decision in the present case, that a defendant's mere denial of participation in the acts evidencing the crime charged does *not* raise the issue of intent. *Id.* at 448; *see also United States v. Coades*, 549 F.2d 1303 (9th Cir. 1977) (concluding that extrinsic offense evidence was not admissible to prove intent in an attempt case).

Finally, although the Solicitor General contends that it is constitutionally permissible to require a criminal defendant to "choose" between a jury finding the issue of intent and the introduction of prejudicial prior acts evidence, his argument assumes that such prior acts evidence is not only relevant to an issue in the case, but that the district court has determined that the government's need for such evidence outweighs its prejudicial effect. *See United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979). As noted above, however the district court in this case ruled on the admissibility of prior acts evidence before the government's direct case and without knowing the nature of Petitioner's defense. Petitioner respectfully submits that to *require* a criminal defendant either to stipulate intent or suffer the introduction of clearly prejudicial evidence, *without regard to the government's need for such evi-*

*dence*, deprives the accused of his rights to due process and trial by jury under the Fifth and Sixth Amendments to the United States Constitution. *See generally In re Winship*, 397 U.S. 358 (1970); *Screws v. United States*, 325 U.S. 91 (1945).

**Denial of Petitioner's Motion to Compel the Government to Affirm or Deny the Use of Illegal Electronic Surveillance**

As could be expected, the Solicitor General's response to Petitioner's arguments and authorities concerning the proper construction of the term "claim," as used in 18 U.S.C. § 3504 (1976), consists largely of citations to lower federal court decisions adopting definitions of that term more favorable to the government's position on this issue. (Solicitor General's Brief at 7-8). These additional citations, however, only serve to emphasize the conflict among the lower federal courts on the question of what constitutes a "claim" sufficient to trigger the government's obligation to affirm or deny the use of unlawful surveillance under section 3504 and underscore the need for Supreme Court guidance on this issue.

In apparent recognition of the conflict among the lower federal courts,[4] the Solicitor General offers an alternative argument. Contending that the sufficiency of the government's response to a claim under section 3504 should be

[4] The Solicitor General appears to suggest that, notwithstanding the differing interpretations of the term "claim" adopted by the lower federal courts, all of the cases construing § 3504 have required the defendant to make "detailed allegations" of illegal surveillance. In reaching this conclusion, however, the Solicitor General overlooks a number of cases wherein the government has affirmed or denied the use of electronic surveillance in response to allegations of wiretapping which were not particularized. *See, e.g., United States v. Lange*, 422 F.Supp. 400, 404 (E.D. Wis. 1976); *In re Grusse*, 402 F.Supp. 1232, 1234 (D. Conn.), *aff'd*, 515 F.2d 157 (2d Cir. 1975); *see also In re Grand Jury Proceedings*, 664 F.2d 423 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *People v. Grieco*, 94 Misc.2d 1043, 406 N.Y.S.2d 426, *aff'd*, 98 Misc.2d 310, 413 N.Y.S.2d 821 (1978).

judged in relation to the specificity of defendant's allegations of illegal surveillance, the Solicitor General concludes that Petitioner's claim was not sufficiently detailed to require the government to search its records and unequivocally affirm or deny the use of unlawful surveillance. Although this rationale for upholding the district court's denial of Petitioner's motion under section 3504 is suggested by the Court of Appeals' opinion, it is no more supported by the language or purpose of section 3504 than the requirement that Petitioner's claim consist of "an unequivocal statement" that illegal surveillance did in fact take place.

In the first place, to require detailed allegations of unlawful surveillance in order to trigger the government's obligation to unequivocally affirm or deny is simply a roundabout way of requiring that the defendant's claim consist of "an unequivocable statement" that unlawful surveillance did in fact take place. In those cases where the defendant is unable, due to the covert nature of electronic surveillance, to make such a statement, the government could simply contend that the specificity of the defendant's claim was insufficient to require a response. *See, e.g., United States v. See*, 505 F.2d 845, 856 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975).

More importantly, to allow the government to vary its response depending upon the specificity of the defendant's claim, ignores the gross disparity between the very real difficulties faced by a defendant attempting to establish unlawful surveillance and the minor administrative burden placed on the government in requiring it to affirm or deny the use of such surveillance.[5] The co-

[5] Although the Solicitor General contends that a record search of the National Security Agency would have delayed the trial and placed an undue burden on the government, the Assistant U.S. Attorney acknowledged at the pretrial hearing that an established procedure for an agency check, requiring only six to eight weeks, could have been effected. (Pet. App. A24). Moreover, counsel for Petitioner advised the district court at the hearing that Petitioner

vert nature of electronic surveillance, which makes it virtually impossible for a defendant to make an "unequivocal statement" that surveillance has occurred, also make is virtually impossible for a defendant to gather the evidence necessary to formulate "detailed allegations" that unlawful surveillance has taken place.

In any event, Petitioner respectfully submits that the government's response to Petitioner's claim under section 3504 was insufficient under any standard. Although the portions of the trial transcript selected by the Solicitor General for quotation seem to suggest that the government made a categorical denial of the use of any electronic surveillance, a more careful reading of the trial transcript shows that the Assistant U.S. Attorney offered only a qualified statement, expressing his *belief* that there had been no surveillance:

> I will state further . . . *so far as I know*, the evidence in this case is not derived from any monitoring of any kind. I've talked to every agent involved. I've read every report *I could find . . . so far as I can tell*, the case derived from observation of his activities . . . .

(Pet. App. A27) (emphasis added). The qualified statements provided by the government in this case stand in marked contrast to the responses given by the government in certain of the cases cited and apparently endorsed by the Solicitor General in his brief. For example, in *In re Grand Jury Proceedings*, 664 F.2d 423 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), the movant's allegations of electronic surveillance were remarkably similar to those made by Petitioner in the present case.

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had no objection to proceeding to trial prior to the conclusion of an agency check. (Pet. App. A33). *See United States v. Buck*, 548 F.2d 871, 874 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977); *United States v. Hearst*, 412 F.Supp. 863 (N.D. Cal. 1975) (approving a similar procedure). Thus, it would appear that the government's concerns as to the delay and burden of conducting an agency check were more imaginary than real.

The movant, a grand jury witness and member of the Church of Scientology, and his attorney each submitted statements reciting their *belief* that their telephone conversations had been intercepted, together with documents evidencing a *policy* of certain federal and state agencies to conduct electronic surveillance of Church of Scientology members. In response to the movant's claim under section 3504, the government conducted a record search of no less than eleven federal agencies, including the National Security Agency. *See also In re Grand Jury Proceedings*, 643 F.2d 626 (5th Cir. 1981) (wherein the government provided a "categorical denial" in response to movant's "general assertion" that questions asked by grand jury were derived from illegal wiretaps). By contrast, there was no *denial* in the present case, the sole government response being a qualified statement of the Assistant U.S. Attorney expressing his *belief* that no surveillance had taken place.

## CONCLUSION

For the reasons stated above and in Petitioner's original Petition for a Writ of Certiorari, it is respectfully submitted that this Court should grant a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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